Petition

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HYBUD EQUIPMENT CORP., BUDOFF IRON & METAL CO., GLENWILLOW LANDFILL, INC., WALDO A. SOBER, JR., J.P. HAWLEY SANITATION, INC. & G. G. KOVACH,
Petitioners-Plaintiffs,

v.

CITY OF AKRON, OHIO, JOHN S. BALLARD, RAY KAPPER, ELSIE REAVEN, JAMES R. WILLIAMS, TIM DAVIS, VINCENT CIRACO, ROBERT L. GOEHLER, REGINALD K. BROOKS, KATHLEEN GREISING, ROBERT J. OTTERMAN, MICKEY ERITANO, JR., JOHN V. FRANK, DON PLUSQUELLIC, WILLIAM C. GRIMM, ROBERT EDWARDS, COUNTY OF SUMMIT, OHIO, MARK RAVENSCRAFT, TED COLES, DON STEPHENS, AND OHIO WATER DEVELOPMENT AUTHORITY,
Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that a city ordinance eliminating competition in waste disposal and recycling, enacted to ensure the profitability of a city-owned facility, was exempt from the antitrust laws under the Tenth Amendment, as interpreted in *National League of Cities* v. *Usery*?

2. Did the Sixth Circuit err in holding that a city ordinance eliminating competition in waste disposal and recycling, enacted to ensure the profitability of a city-owned facility, was exempt from the antitrust laws under the *Parker* v. *Brown* "state action" doctrine because the city is a home-rule municipality (similar to the issue in *Community Communications Co., Inc.* v. *City of Boulder,* 632 F.2d 704 (10th Cir. 1980), *cert. granted,* 101 S. Ct. 1756 (1981) (No. 80-1350))?

3. Did the Sixth Circuit err in holding that a city ordinance requiring solid waste collectors to deliver to the city without compensation valuable recyclable materials such as metal and cardboard, acquired by contracts from their customers, was not an unconstitutional taking in violation of the Fourteenth Amendment, where the city's purpose is to sell these materials for profit?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are set forth fully in the caption of the case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 654 F.2d 1187 and appears in Appendix A herein. The opinion of the United States District Court for the Northern District of Ohio is reported at 485 F. Supp 671 and appears in Appendix B herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 17, 1981. This

petition is filed within the period of time (ninety days) established by 28 U.S.C. § 2101(c) (1976). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes and ordinances are quoted in the Appendix.

U.S. Constitution, art. I, § 8 (Appendix C)
U.S. Constitution, amend. V (Appendix D)
U.S. Constitution, amend. X (Appendix E)
U.S. Constitution, amend. XIV (Appendix F)
Ohio Constitution, art. XVIII, § 3 (Appendix G)
Sherman Act, 15 U.S.C. §§ 1, 2 (Appendix H)
Ohio Rev. Code Ann. § 715.43 (1953) (Appendix I)
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City of Akron Ordinance No. 841-1976 (Appendix K)

STATEMENT OF THE CASE

In 1976 the City of Akron, Ohio decided to build a facility that would burn solid waste and generate steam therefrom for sale to local businesses. The City thought this Recycle Energy System ("RES") would eliminate the problem of having to locate new land disposal, *i.e.*, burial, sites for local waste and also replace the private steam supplier, Ohio Edison, that had long wanted to discontinue this service (Appendix A at A-3). The City wanted to finance the RES by selling revenue bonds. Its underwriters advised that to make the bonds marketable the City should take certain actions that would minimize the economic risk of the project. These actions included various commitments to prevent the creation of competitive facilities and passage of a city ordinance, No. 841-1976, that would require all solid waste collected in the City to be first offered to the RES for use either as fuel to

generate steam or as recyclable material the RES could sell in established scrap markets. The ordinance also required a "tipping fee" to be paid to the RES for accepting whatever material it wanted, and this fee could be set at whatever level the City deemed necessary to generate the desired revenues (Appendix A at A-3-5).

Petitioners are private firms that have competed for many years in the waste disposal and recycling markets in Akron and surrounding areas. Some of the petitioners collect waste from businesses in the area. Noxious and valueless waste is taken to landfills for burial. Non-noxious, valuable wastes, especially clean cardboard and ferrous metal scrap, are sold in interstate markets. In many cases, petitioners acquire these valuable "recyclable" wastes from their customers pursuant to contracts which entitle the customer to a share of the proceeds from such recyclable sales. Some of the petitioners operate landfills outside but near Akron and have for many years competed for business from collectors operating in the city. None of the petitioners' businesses has ever been regulated by the City, although they have been required to obtain city licenses in order to collect waste in the City. These licenses have been routinely granted to any person meeting minimal vehicle and insurance requirements (Appendix B at B-23-25 and B-26-27).

In early 1978, petitioners filed a complaint in the United States District Court for the Northern District of Ohio, seeking a declaratory judgment that the Akron Ordinance and related measures violated the Sherman Act (15 U.S.C. §§ 1, 2 (1976)), and the United States Constitution's commerce clause (U.S. Const. art. 1, § 8) and its prohibition against taking property without compensation and denying due process (U.S. Const. amend. V, XIV, § 1). After trial in May, 1979, the district court held that the City was exempt from the Sherman Act under the doctrine of *Parker* v. *Brown*, 317 U.S. 341

(1943), and that the actions complained of violated none of the constitutional provisions noted (Appendix B). On appeal to the United States Court of Appeals, the judgment for the City was affirmed.[1] The Court of Appeals held that the Tenth Amendment to the Constitution and this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) barred application of the Sherman Act. It held that the commerce clause was not offended because the restraint on interstate commerce in recyclables was indirect and justified by the local purpose of the City. It rejected petitioners' taking argument, reasoning that since the City was carrying out legitimate police

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[1] The United States government's position in this case is noteworthy, albeit enigmatic. The Antitrust Division has previously taken the same position regarding "state action" which petitioners have argued here: that a state mandate is required for antitrust immunity. *See, e.g.*, United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400, 404 (W.D. Tex. 1978). The Antitrust Division did not participate in our case. However, the Department of Energy ("DOE") and Environmental Protection Agency ("EPA"), acting through the Land and Natural Resources Division of Justice, filed an *amicus* brief in the Court of Appeals — a brief that *disclaimed any position on the antitrust issues* but urged that Akron's novel approach to resource recovery should not be struck down under the Fourteenth Amendment. The Sixth Circuit placed some weight on the Justice Department's brief in finding Tenth Amendment immunity *from the antitrust laws* as well as in rejecting the Fourteenth Amendment challenges to the Akron Ordinance. The Department of Justice immediately moved for amendment of the Sixth Circuit's opinion to delete any suggestion that it had taken any position on the antitrust issues, which motion was denied (Appendix L). We surmise, therefore, that DOE and EPA believe that the energy-related goals of the city are more important than the anticompetitive means it used while the Antitrust Division feels that the means must be invalidated under the Sherman Act. Instead of resolving this issue internally, it appears that these three divisions of the executive branch expect the courts to reconcile their disparate interests.

power functions it could help to offset the cost by taking petitioners' recyclables and selling them (Appendix A).[2]

It is undisputed that the effect of the City actions petitioners challenge is to eliminate competition by petitioners with the City in the waste disposal and recycling business in Akron, that interstate commerce is affected, and that, if engaged in by private firms, these actions would violate the Sherman Act (Appendix B at B-38-40). It is undisputed that no provision of state law requires the City to take these actions or expresses any policy of the State preferring governmental monopoly over competition in waste disposal and recycling fields (Appendix B at B-8-10). It is also undisputed that petitioners' competitive activities pose no problem of public health or safety that the City wishes to remedy, but, rather, that the City is restraining petitioners' activities and taking their property solely to ensure the financial success of the RES (Appendix A at A-5, A-19).

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[2] While petitioners continue to believe that their contentions involving the commerce clause and due process have merit, these issues are not raised in the petition in order to focus attention on the two issues that petitioners believe may be of greatest importance to the Court.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit Failed To Apply The Decisions Of This Court And Set A Precedent In Conflict With Important National Policies In Holding That A Home-Rule City's Restraint Of Trade To Protect A City-Owned Business Is Immune From The Antitrust Laws.

A. National League Of Cities v. Usery *Does Not Bar The Application Of The Antitrust Laws To The Ordinance In Question, As Their Effect Would Be Not On The City As City But Only To Displace Municipal Regulation Of Private Businesses.*

The Sixth Circuit, relying on *National League of Cities* v. *Usery,* held that regulation of solid waste disposal is a customary area of local concern reserved to local government by practice, and that therefore the Tenth Amendment shields local laws that restrain trade in this area from application of the antitrust laws. The appeals court's decision is significant because it introduces into an already complicated area of antitrust law the further complication of a constitutional issue which is likely to cause extensive confusion in the lower courts. This Court has already granted *certiorari* in *Community Communications Co., Inc.* v. *City of Boulder,* 630 F.2d 704 (10th Cir. 1980), *cert. granted,* 101 S. Ct. 1756 (1981) (No. 80-1350), where the question is raised under the *Parker* v. *Brown* doctrine whether the antitrust laws were intended to apply to the actions of a home-rule municipality. In order to reduce confusion, we request that the Court also grant *certiorari* in this case to consider the closely-related constitutional issue raised in the Sixth Circuit's opinion, order this case briefed on an accelerated schedule, and decide the two cases together.

The Sixth Circuit's broad constitutional ruling would undermine this Court's holdings in several recent cases carefully defining and limiting the *Parker* v. *Brown* state

action exemption from the antitrust laws. This undermining would result from the finding that the Tenth Amendment bars antitrust scrutiny of any action of a state or political subdivision in an area of local concern.[3] Yet, in so ruling, the Sixth Circuit misinterpreted this Court's decision in *National League of Cities* v. *Usery* and failed to recognize the limits of that decision explicated in this Court's more recent ruling in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 101 S. Ct. 2352 (1981).[4] *Hodel* made clear that the broad view of *National League of Cities* which the Sixth Circuit followed was not correct.

In *National League of Cities* the Court distinguished between congressional authority "to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside . . . [and] a similar exercise of congressional authority directed not to private citizens, but to the States as States." 426 U.S. at 845. Applying this distinction, the Court found the provisions of the Fair Labor Standards Act regulating the wages and hours of local government employees in violation of the Tenth Amendment because they attempted to regulate the States as States, interfering with the authority of States

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[3] The same court of appeals had earlier held the operation of a metropolitan airport to be an "integral government function." Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).

[4] The court may possibly have been unaware of *Hodel*. The *Hodel* decision was handed down June 15, 1981. The Sixth Circuit's decision in this case was issued July 17, 1981. Petitioners did not bring the *Hodel* decision to the Sixth Circuit's attention because respondents had not suggested a Tenth Amendment defense, and petitioners had no reason to believe that the Tenth Amendment issue was involved in this case.

and their political subdivisions to control their own internal organization through critical employment decision.

More recently, this Court clarified the limits of that decision in *Hodel.* That case involved federal laws enacted under the commerce clause to regulate surface coal mining. A district court had held that the Act violated the Tenth Amendment because it "interferes with the States' 'traditional governmental function' of regulating land use." *Hodel* v. *Virginia Surface Mining & Reclamation Association,* 101 S. Ct. at 2364. This Court reversed, holding the Act constitutional even though it displaced state regulation of land use. The Court made clear that nothing in *National League of Cities* "suggests that the Tenth Amendment shields the States from preemptive federal regulation of *private* activities affecting interstate commerce." 101 S. Ct. at 2367 (emphasis in original). This was so even though Congress "exercise[d] its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 2368.

To the extent one might have thought the rationale of *National League of Cities* relevant to this case, *Hodel* makes clear that it is not. Petitioners have not challenged the establishment of the city-owned RES, and this case does not involve the application of the antitrust laws to the RES's activities or internal organization. Petitioners challenge only the Akron Ordinance, directed to private businesses, which prohibits competition in the recycling and related businesses in order to prevent private businesses from competing with the city-owned facility. The Sherman Act has established competition as the guiding rule in the economy, and has displaced conflicting local regulation. As *Hodel* makes clear, because the Tenth Amendment prohibits only regulating States as such, it does not bear on the application of the antitrust laws in

this case to prevent the city Ordinance from stifling competition in the private sector of the economy. Certainly, the fact that a city enters the marketplace and competes with private firms does not convert the antitrust laws into laws that regulate the city as city.

If the Sixth Circuit's ruling is allowed to stand, it could have significant consequences for competition in important areas of our economy. The opinion in *National League of Cities* identified as areas of traditional governmental functions — where the federal government could not interfere in local government's relationship with its own employees — fire prevention, police protection, sanitation, public health, parks, recreation and education. 426 U.S. at 851, 855. As one leading authority on local government has noted, in each of these fields we rely also on competition in the private sector:

> Americans customarily look not only to state and local government but also to the private sector for services in various fields that typify local government activity. There are private elementary and secondary schools, private refuse scavengers and water companies, private plant watchmen and detectives, private health insurers and hospitals, Walt Disney Enterprises and the Audubon Society. Our needs in such fields are to be served, we customarily think, by some *mix* of governmental and private activity.[5]

However, under the Sixth Circuit's holding — that in areas of local concern the Tenth Amendment prohibits

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[5] Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v. Usery," 86 Yale L.J. 1165, 1175 (1977) (emphasis added).

displacement of local regulation by the antitrust laws and therefore allows cities to forbid competition — individual cities would be able to prohibit competition in each of these important areas in the local economy.

As in this case, cities might well have strong pecuniary motivations to regulate private competition in order to maximize their revenues from their own similar activities. Shielding such local regulation of interstate businesses from displacement by the Sherman Act should not be accomplished by the Tenth Amendment, as *Hodel* makes clear. We suggest that it is important for the Court to review this Constitutional decision in tandem with its consideration of the *Community Communications Co.* case.

B. *Akron's Home Rule Authority Does Not Bring Its Ordinance Within The* Parker v. Brown *State Action Immunity From Application Of The Antitrust Laws.*

In addition to its Tenth Amendment holding, the Sixth Circuit also appeared to hold, alternatively, that because Akron is a home-rule municipalilty under the Ohio constitution its actions are equivalent to the actions of the State for purposes of *Parker* v. *Brown* state action immunity. This issue is substantially the same as that already before the Court in *Community Communications Co., Inc.* v. *City of Boulder, Colorado.* The merits of that issue have been fully presented to the Court in that case, and we will not attempt to discuss it here.

To the extent that the Sixth Circuit might have been reasoning that Akron was carrying out the policy of the State of Ohio in adopting anticompetitive practices, the court was clearly in error. As the following review of the relevant statutory scheme in Ohio demonstrates, no mandate or policy of the state remotely satisfies the

standards of *Parker* and of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).[6]

The suggestion that Akron has authority from the state to engage in anticompetitive practices relies on the Ohio constitution, which provides for home-rule as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary

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[6] It is unnecessary to label the challenged Akron Ordinance as "proprietary" rather than "governmental" or to decide whether it represents an "integral" versus "non-integral" function in order to reject, respectively, *Parker* v. *Brown* or the Tenth Amendment as a bar to Sherman Act application. As to the first, Chief Justice Burger's concurring opinion in *City of Lafayette* v. *Louisiana Power & Light Co.* did not suggest blanket immunity for "governmental" actions. Rather, it agreed with the plurality's position that a municipality's anticompetitive actions would be immunized only when the state had mandated the actions, but *rejected* immunity altogether where "proprietary" actions were involved. Further, the key to the Chief Justice's "proprietary" label was that "all of the parties are in a competitive relationship," 435 U.S. at 309, 422 n.3, which is precisely the case here. Moreover, the competitive activities of the utility in *Lafayette* which he classified as "proprietary" are virtually identical to the competitive activities of the RES. Thus, the "proprietary/governmental" distinction should not, as the court of appeals suggested (Appendix A at A-16-19), confuse the application of the *Parker-Lafayette* doctrine.

The "integral/non-integral" dichotomy of *National League of Cities* v. *Usery* is similarly irrelevant here. Application of these characterizations becomes pertinent only after it is found that the federal law in issue seeks to regulate the state as state as opposed to regulating private firms and displacing inconsistent local regulations. As *Hodel* makes clear, if the federal law seeks to regulate private businesses that affect interstate commerce, the Tenth Amendment is not implicated. Even were the "integral/non-integral" distinction relevant, steam generation and sale of materials in the scrap market are not integral functions under the rationale of *National League of Cities* v. *Usery*.

> and other similar regulations as are not in conflict with general laws.

Ohio Constitution, art. XVIII § 3. Further, Ohio statutes delegate to municipalities the authority to regulate the disposal of garbage. Ohio Rev. Code Ann. §§ 715.43, 717.01(C) (1953). Both the Ohio Supreme Court,[7] in the case cited by the Sixth Circuit (Appendix A at A-8), and the district court (Appendix B at B-8) found that the City was authorized to enforce sanitary regulations as long as they were *not* in conflict with the general laws of the state. Neither the Sixth Circuit, the district court, nor the Ohio Supreme Court has suggested that the State mandated or even contemplated that municipalities would use whatever anticompetitive measures they chose to accomplish their purposes. In fact, the district court specifically found that Ohio had adopted the waste disposal policy of permitting local authorities to declare the policy that would control within their borders; the State's policy was to have no policy, according to the district court, and the City was therefore free to fill this vacuum however it thought necessary.[8]

Under this Court's decisions, general authorization from the State to act in the area of solid waste is *not* sufficient to immunize anticompetitive behavior in that area from the antitrust laws; specific authorization for the use of anticompetitive means is necessary for such immunity.[9]

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[7] State *ex rel.* Moock v. City of Cincinnati, 120 Ohio St. 500, 166 N.E., 583, *cert. denied,* 280 U.S. 578 (1929).

[8] Appendix B at B-8.

[9] *See, e.g.,* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 414; Cantor v. Detroit Edison Co., 428 U.S. 579, 585, 604 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

II. The Sixth Circuit Erred In Holding That A City's Appropriation Of Recyclable Metal And Paper For The Purpose Of Increasing The Revenues Of A City Facility Did Not Constitute An Unconstitutional Taking Of Property.

The Ordinance's requirement that valuable recyclable materials acquired by petitioners and separated by them from other solid waste be provided to the RES without compensation constitutes an unconstitutional taking of property for a public purpose. The Sixth Circuit held that, since construction of the RES was within Akron's police power, Akron may "appropriate" valuable recyclable materials without compensation "in order to pay part of the general social costs of waste disposal" (Appendix A at A-13). We urge the Court to grant *certiorari* on this issue because, if allowed to stand, the Sixth Circuit's decision would allow a city to appropriate property without compensation wherever it intended to use the proceeds from its sale of the property to support an activity within its police power.

The consistent rationale of this Court's "taking" cases is that when economic loss is the result of government's enhancement of its own resource position, compensation is constitutionally required; but when loss, however severe, is the consequence of the government arbitrating between conflicting interests, such as to abate a public nuisance, the result is a noncompensable exercise of police power. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155 (1980); *United States* v. *Causby,* 328 U.S. 256 (1946).[10] Akron's action is a clear violation: it is a physical taking of valuable materials to be sold for recycling or to be used in generating steam for sale to city

[10] *See also,* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960); Sax, "Takings and the Police Power," 74 Yale L.J. 36, 63 (1964).

businesses. The materials involved are non-noxious;[11] if not taken by Akron they would continue to be sold by petitioners for reuse. These materials would not be disposed of in landfills, and therefore they are unrelated to any concerns about diminishing landfill capacity in the area.

The Sixth Circuit cited no support for its reliance on the fact that the revenues generated from the appropriated property would support waste disposal. If the Sixth Circuit's rationale were correct, it would be tantamount to saying that, because the RES serves a valid police power objective, Akron may condemn land on which to build it and pay no compensation to the owner. That surely is not the law.

The Sixth Circuit also reasoned that the Ordinance was justified by Akron's interest in maintaining a steam supply for downtown businesses and the need to have these recyclable resources in order to produce that steam efficiently (Appendix A at A-13). Again the court was confusing the legitimacy of an ultimate goal with the legitimacy of a means to that end. What a city intends to do with the revenues it earns does not alter the fact that taking private property for the purpose of selling it is unconstitutional unless the owner is compensated. If the court's rationale were sound, it would allow Akron to appropriate, without compensation, petroleum from local oil companies on the ground that the petroleum was needed to run the steam generating plant.

The Sixth Circuit relied heavily on two old Supreme Court cases, *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U.S. 306 (1905); and *Gardner* v. *Michi-*

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[11] The Sixth Circuit acknowledged that these materials posed no health concern (Appendix A at A-5).

gan, 199 U.S. 325 (1905). In doing so, the court misconstrued their holding. These cases considered the validity of municipal ordinances which mandated destruction of all the cities' garbage by companies with exclusive franchises to perform the task. The garbage at issue was butchers' offal, putrid animal or vegetable matter, any fish, flesh, or food, and any dead animals. The Court found that the cities' actions were motivated by public health concerns based on the threat of disease and noxious odors and gases if the garbage were not properly disposed of. The Court also noted that feeding garbage to cows and hogs was widely considered the cause of disease. In the face of an argument that the garbage had value as animal feed, the Court held that "[t]he exercise of the police power by the *destruction* of property which is *itself a public nuisance* . . . is very different from taking property for public use. . . ." *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U.S. at 324, quoting from *Mugler* v. *Kansas,* 123 U.S. 623, 669 (1887) (emphasis added).

The facts in this case are different in two critical respects. First, the conceded purpose of the challenged Ordinance is not the destruction of the property but instead its acquisition by the City. The Sixth Circuit found (Appendix A at A-5) — and the Ordinance in its preamble acknowledges (Appendix K) — that the purpose of the Ordinance is to require cost-free transfer to the City of valuable materials to assure a high level of revenues for the RES. The metal and paper will be sold to recycling markets by the RES just as petitioners now do, except in those cases where the RES determines it can earn more revenues by burning the paper materials to generate steam because of their high BTU content. *California Reduction Co.* and *Gardner* would have been more like this case — and this Court surely would have reached

the opposite result — if instead of depriving the plaintiffs of the value of garbage as animal feed so that it could be destroyed, the City there had appropriated the garbage to feed to city-owned hogs so as to increase city revenues from the sale of pork.

The second respect in which this case is different from the two 1905 cases is that the materials involved are different in kind and do not involve any problem of nuisance or public health. Since 1905 the nature of solid waste has changed radically. Today only about 20% of typical municipal refuse is garbage, while about 36% is paper and cardboard and about 8% is metal.[12] The recyclable materials at issue here are non-noxious paper and metal which do not present any public problem. These materials were not even included in the definition of garbage in the 1905 cases. The proof that these materials present no public problem is that the materials would not end up in landfills if Akron did not take them, and that the RES when it does take them will treat the materials in the same fashion as petitioners and they will move in substantial amounts into interstate and foreign commerce.

The Sixth Circuit also reasoned that Akron could have taken over the collection of solid waste completely and that, therefore, it could adopt the less restrictive alternative of merely taking what private collectors acquired from waste generators. Two responses are appropriate. First, it is not clear that the City could take over the

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[12] Report of Bureau of Mines, reproduced in appendix to dissent of Justice Douglas in United States v. SCRAP, 412 U.S. 669, 699, 715 (1973).

business for the avowed purpose of making profits.[13] And even if it could take over the entire waste business, it could not force waste generators to give up valuable recyclable materials such as these without compensation. Petitioners receive these materials from such generators by contract and have the same property rights in them as the generators.

Second, the City did *not* take over the entire business. It did not prohibit the continued operations of private collectors and haulers who have been operating in the City for approximately forty years. It merely took their property. It is not the law that when a government has power to displace a private industry completely, it also has the power to appropriate the property of that industry. According to this logic, Akron could appropriate virtually anything. If it can take over the business of generating electricity, then it could force power companies to provide their electricity for free to satisfy its own requirements and also to sell energy to others at a profit.

Petitioners submit that it was for the very purpose of barring such uncompensated takings for public use that the constitutional prohibition was established. Just because a taking of property is within the government's police power does not mean there is any exemption from the requirement of compensation.

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[13] As this Court very recently held, a long history of behavior assented to by the government

> can lead to the fruition of a number of expectancies embodied in the concept of "property" — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land owner's property. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

The long history of properly conducting business by Hybud and Budoff reinforces the traditional property concepts at stake.

CONCLUSION

For two reasons we suggest that this case is appropriate for *certiorari.* First, the Sixth Circuit's decision introduces into an already complicated area of antitrust law a new constitutional ground for decision. This Court already has pending in the *Community Communications Co.* case the issue of determining congressional intent with respect to the application of the antitrust laws to home-rule municipalities. We suggest that at the same time the Court should also decide the constitutional issue raised by the Sixth Circuit in this case. The best way to do this would be to grant *certiorari* here, order an expedited briefing and hearing schedule, and decide the two cases together.

Second, this case presents a question involving the ability of a city to appropriate private property without compensation to finance public works. Guidance for lower courts on this issue would be useful.

Respectfully submitted

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Date: October 15, 1981

Appendix

No. 80-3121

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HYBUD EQUIPMENT CORP.; BUDOFF IRON & METAL CO.; GLENWILLOW LANDFILL, INC.; WALDO A. SOBER, JR.; J. P. HAWLEY SANITATION, INC.; & G. G. KOVACH,

Plaintiffs-Appellants,

v.

CITY OF AKRON, OHIO; JOHN S. BALLARD; RAY KAPPER; ELSIE REAVEN; JAMES R. WILLIAMS; VINCENT CIRACO; ROBERT GOEHLER; REGINALD BROOKS; KATHLEEN GRIESSING; ROBERT OTTERMAN; MICKEY ERITANO, JR.; JOHN FRANK; DON PLUSQUELLIC; WILLIAM C. GRIMM; ROBERT EDWARDS; COUNTY OF SUMMIT, OHIO; MARK RAVENSCRAFT; TED COLES; DON STEPHENS; OHIO WATER DEVELOPMENT AUTHORITY,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 17, 1981.

Before: MERRITT and MARTIN, Circuit Judges; GORDON, Senior District Judge.*

* The Honorable James F. Gordon, Senior District Judge, United States District Court for the Western District of Kentucky, sitting by designation.

MERRITT, Circuit Judge. In the late 1960s, the City of Akron was confronted by the need to develop new sources of energy and to find alternative methods of waste disposal. In an attempt to alleviate both problems, the City decided to construct a $55 million energy recycling plant, a facility that generates energy in the form of steam heat from the incineration of trash.[1] Plaintiff-appellants seek injunctive relief against several actions undertaken by the City and other defendants to guarantee the feasibility of the plant, alleging that those actions violate the federal antitrust laws and the due process, interstate commerce and takings clauses of the Constitution. Underlying the legal issues are related and sometimes conflicting national policies respecting resource and energy conservation, environmental protection and energy production. After reviewing the questions presented, the District Court entered judgment for the defendants on all claims. *Glenwillow Landfill, Inc.* v. *City of Akron*, 485 F.Supp. 671 (N.D. Ohio 1979). The issues presented on appeal are whether the City has violated either federal constitutional provisions or the antitrust laws by adopting a city ordinance monopolizing garbage collection and disposal and eliminating competition in the market for recyclable wastes. We find no federal constitutional or statutory violation and accordingly affirm.

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[1] Municipal efforts in the field of waste recovery and energy recycling have developed dramatically in the last decade. In its March 1981 report, the National Center for Resource Recovery, Inc. listed sixty-three "materials and energy recovery facilities," at various stages of construction or operation, and varying in capital cost from $200,000 to $160 million, located in twenty-six states throughout the nation. Almost all the facilities include a local government entity as a primary participant, and almost all use one or more of several processes to convert deposited solid waste into energy. A smaller number are also equipped to recover recyclable materials, such as ferrous and nonferrous metals and glass, for reuse. The Akron facility that is the focus of the present lawsuit, which was constructed at a cost of $55 million and has a capacity of one thousand tons of waste per day, appears to be among the more ambitious projects.

I. STATEMENT OF THE CASE

A. The Akron Energy Recycling Plant and the Ordinance in Question

In the late 1960s, Akron's solid waste disposal landfills were approaching capacity, and a new landfill operating in violation of EPA standards was immediately challenged in court. In addition, Ohio Edison, which supplied steam heat to businesses in downtown Akron, sought to abandon the Akron market. The City began to search for an alternative energy supply. After a period of study, the City decided to develop the solid waste recycling plant, but the revenue bonds issued to finance the project proved unmarketable. The City turned to the Ohio Water Development Authority, a state agency, for financial assistance. It agreed to finance the project but later discovered that it could not secure the bonds from its general fund.

At this juncture, in 1976, the firm of Dillon, Reed & Co. was hired to study and possibly underwrite the bonds. To improve the marketability of the $46 million bond issue, the underwriters imposed the requirement that an agreement be executed between the Water Authority, Summit County (in which Akron is situated), and the City of Akron. Among the covenants included in the agreement was the requirement that the City enact an ordinance that would guarantee a supply of solid waste for the plant.

This is the ordinance challenged here. It was passed by the City in October 1976. Together the agreement[2] and the

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[2] The pertinent provisions of the cooperative agreement read as follows:

> [The City of Akron] will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal [at the plant] and for which the [plant] has capacity available and which the [Water Authority] determines to be detrimental to the [plant], and, further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. . . .
>
> • • •

ordinance[3] prohibit the establishment of alternative waste disposal sites, require all garbage collectors within the City and County to deposit at the plant all waste "acceptable for disposal" at the facility, and require all collectors to pay a "tipping fee" when they deposit waste at the plant. Collectors violating the ordinance could lose their licenses and be subject

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For the term of this Agreement, the [City] shall require that all collectors and haulers of Solid Waste within the [City] be licensed by the [City] and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the [City] which is acceptable for disposal by the [plant] to be delivered to the [plant] for disposal through the [plant] and require that such haulers and collectors and the [City] pay or cause to be paid the fees and charges imposed by the [City] for the disposal of Solid Wastes at the [plant]. The [City] will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the [City] and which is acceptable for disposal by the project, to be delivered to the [plant] for disposal through the [plant].

• • •

The [City] shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the [plant] at a level which assures an adequate supply of Solid Waste for the purpose of the [plant] and, subject to the foregoing, shall be comparable with competitive charges for such services. . . .

• • •

The County will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment which [the Water Authority] solely determines to be detrimental to the [plant] of Solid Waste which is acceptable for disposal by the [plant] and for which the [plant] has capacity available, and further to the extent legally permissible, it will oppose the establishment, construction or operation of such facilities.

• • •

The County will take all legally available action, administrative, judicial and legislative, to cause all Solid Waste generated within the County and which is acceptable for disposal by the [plant] and for which the [plant] has capacity available, to be delivered to the Project for disposal through the [plant].

[3] The challenged provisions of the ordinance read:

Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant be-

to criminal penalties. These enactments were considered necessary for the financial success of the plant, for the defendants and the underwriters feared that without such restrictions it would be impossible to guarantee a sufficient waste supply from which a steady source of energy for potential customers could be generated. Some materials are not deposited at the plant, such as recyclables presorted at the source that never enter the waste stream, and materials judged unacceptable for disposal at the facility (*e.g.*, hazardous wastes and solid matter that the plant is unequipped to incinerate). The wastes "acceptable for disposal" at the facility consist of two types of solid materials — those that are incinerated to generate steam, and those (primarily ferrous) that cannot be burned but can be recovered and recycled. Some non-metal recyclable materials, such as paper products, which prior to the enactment of the ordinance were separated out and sold by the collectors, now will be incinerated instead to generate steam. Concern over the decision to destroy recyclable paper products caused the American Paper Institute to file an amicus brief challenging the legality of the ordinance.

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gins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

• • •

No person, except duly authorized collectors of the City or private haulers licensed pursuant to law shall collect or remove any garbage, or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

Another section of the ordinance establishes fees for the collection and disposal of garbage for 1978 and authorizes a City official to promulgate rules on the collection of the fees and, with the Council's consent, to make annual adjustments in the charges.

According to this plan, revenue is earned by the plant in three ways: from the generation and sale of energy, from the tipping fees paid by collectors disposing of waste at the facility, and from the sale of recyclables recovered at the facility. The City has agreed with Teledyne National, the private company that has contracted to operate the plant that Teledyne may retain one-half of the revenues earned from sale of recovered materials.

The plan established in the agreement and ordinance interferes with the previous operations of the plaintiffs, landfill operators and collectors of solid waste in the County. Previously Hybud Equipment Corp. collected waste in the City, charging customers a fee for the service. The waste was hauled to a "transfer station" run by an affiliated company, Budoff Iron & Metal Corp., where recyclable materials were separated out and sold. Hybud paid rebates to its customers from the payments it received from selling the recyclables. The waste that could not be sold was hauled to landfills where Hybud paid a tipping fee to deposit it. Hybud in effect paid customers for the valuable recyclables it received from them while charging them for the service of hauling away nonrecyclable waste. The other plaintiffs are other waste collectors in the City and County and operators of landfill disposal sites that received a significant portion of their income from tipping fees paid by collectors hauling waste originating in the City and the County.

The ordinance and agreement interfere with plaintiffs' businesses in three ways. First, the income of the landfills is substantially reduced because they no longer receive waste (except materials unacceptable at the plant) originating in the City. Second, the collectors are required to haul waste to the plant and pay its fixed tipping fee. This eliminates the competition among waste disposal sites, grants the plant the power to fix tipping fees unrestrained by the forces of a competitive market, and deprives collectors of their former freedom to shop among disposal sites and to patronize those sup-

plying services at minimal combined tipping and transportation costs. Finally, the business of recovering and selling valuable recyclables is removed from collectors such as Hybud. Instead of receiving payments from the sale of the recyclables they collect, haulers are required to deposit them at the plant and pay a tipping fee, as with the nonrecyclable solid waste deposited there. The plant treats the recyclables as it wishes, either burning them to create energy or separating them out and selling them. Either way, the revenue generated from the use of the recyclables is retained by the plant.

Plaintiffs do not challenge the establishment of the plant. The construction of an additional facility to compete in the waste disposal industry, they acknowledge, violates no law. Rather, they challenge the additional actions taken by the defendants to eliminate competition in the industry and to make the plant the sole waste disposal facility in the Akron area. Plaintiffs argue that the economic viability of the plant may not be insured at the price of destroying competition. They seek an injunction prohibiting enforcement of the ordinance and a declaration that the ordinance and other concerted activities among the defendants are illegal. Defendants concede that the agreement and the ordinance were enacted upon the urgings of the project's underwriters in order to guarantee the project's financial success. The defendants as well as the United States Department of Justice in an amicus brief filed on behalf of the Environmental Protection Agency and the Department of Energy argue, however, that the anticompetitive steps taken to make the plant feasible accord with national energy and environmental policy.[4]

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[4] In its amicus brief, the United States has argued that the policies furthered by defendants' actions have been repeatedly addressed by Congress, in, *e.g.*, Energy Policy and Conservation Act, 42 U.S.C. §§ 6201 *passim*; Energy Conservation and Production Act, 42 U.S.C. §§ 6801 *passim*; and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *passim*.

B. Akron's Authority to Build the Plant and Restrict Competition Under State Law

Akron exercises its municipal powers under a grant of municipal home rule found in Ohio's Constitution. Article XVIII, § 3 reads:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Section 7 of Article XVIII authorizes municipalities to adopt charters for their government and, "subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Ohio case law holds that these state constitutional provisions "pass the sovereign power of municipal government . . . directly from the people of the state to the people of the city" and has the effect of delegating a part of the state's "sovereignty" to the city, *State ex rel. Toledo* v. *Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913), including the power to establish a municipal monopoly for the collection and incineration of garbage. *State ex rel. Moock* v. *Cincinnati*, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929).

In addition, Ohio statutes delegate to municipalities the authority to regulate the disposal of garbage. Ohio Rev. Code § 715.43 grants municipalities the authority to "provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof." Similarly, Ohio Rev. Code § 717.01(C) empowers municipalities to "[e]rect a crematory or provide other means for disposing of garbage or refuse. . . ."

The District Court also found authority for the City to engage in the challenged activities in the legislation granting the Water Authority power to develop solid waste treatment

facilities. Ohio Rev. Code § 6123.03 states that the Water Authority is established to protect health and aesthetic values through efficient methods of "disposal . . . or recovery of resources from solid wastes." The Authority is authorized to construct and maintain solid waste projects or to make agreements for their maintenance.

The Authority is empowered to make loans and grants and issue bonds to carry out the statutory purposes and to guarantee the feasibility of projects developed under this statute. Ohio Rev. Code §§ 6123.03, 6123.04, 6123.06 *et seq.* The statute authorizes the Water Authority to "[m]ake and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123 . . .," § 6123.04 (I), and to "[d]o all acts necessary or proper to carry out the powers expressly granted in Chapter 6123 . . . ." § 6123.04 (P). The District Court found that pursuant to this statutory scheme the state legislature had authorized the challenged anticompetitive activities.

II. THE TAKINGS AND DUE PROCESS CLAUSE QUESTIONS

Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. *See* Annots., *Validity of Statutory or Municipal Regulations as to Garbage*, 15 A.L.R. 287 (1921); 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). If any area of the law can be said to be well settled, this one is.

In three pertinent cases, two at the turn of the century in the United States Supreme Court, *California Reduction Company* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner* v. *Michigan*, 199 U.S. 325 (1905), and one in the twenties in the Ohio Supreme Court, *State ex rel. Moock* v. *City of Cincinnati*, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929), three cities, San Francisco, Detroit and Cincinnati, each decided to change local garbage collection and disposal practices by ordinance. Each established a reduction plant or "crematory" and gave one private company a monopoly over garbage collection. The ordinances put existing private garbage collectors out of business; they prohibited existing private collectors from competing with the private contractor who was given the municipal monopoly. In each case the private collectors claimed that the change constituted a taking without just compensation and an interference with established rights of private property, the right to compete in the market place, in violation of substantive due process under the Fourteenth Amendment. In the Cincinnati case the private contractors also argued that the city had not been delegated the authority under the state constitutional home rule provisions to restrain trade and that the ordinance violated the garbage collector's right "to private property, and amounted to a special privilege and the creation of a monopoly in favor of the city's public contractor." 120 Ohio St. at 507.

After noting that "[m]any of the questions involved in municipal sanitation have proved to be difficult of solution" — questions "unsolved by experience or science" — the United States Supreme Court held that the creation of such monopoly "cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes." *California Reduction*,

supra, 199 U.S. at 320-21, 323. As support for this result the Court quoted from Sedgwick's Treatise:

> In Sedgwick's Treatise on Statutory and Constitutional Law the author says that "the clause prohibiting the taking of private property without compensation is not intended as a limitaton of those police powers which are necessary to the tranquillity of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made."

Id. at 324-25.

The Supreme Court then went on to hold, "according to well-settled principles," that the concept of substantive due process – then in its heyday – did not protect the property rights of the garbage collectors although the cities might have adopted a less restrictive solution to the problem. "If it be said that the city might have adequately guarded the public health and at the same time saved the property rights," the Court concluded, "the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case." *Gardner*, *supra*, at 333. The Ohio case came to the same conclusion:

> [W]e do not enter upon a virgin field, since the overwhelming weight of authority, both state and federal, upholds the municipal right to regulate, supervise, and control sanitation, including the collection and disposal of garbage, under the police power of the city and state; and this may be done, notwithstanding the fact that garbage may have animal food value and the authority for such collection and disposal has been exclusively confided to a single person or agency.

120 Ohio St. at 507-08. Akron is an Ohio home-rule city, like Cincinnati, and on the basis of these three cases and the general law in this area we are satisfied that the city has not violated the takings or due process clause of the United States Constitution or the state home rule provisions by setting up a new reduction, "thermal transfer," or "energy recycling" plant and by requiring that local garbage collectors bring all their garbage to the plant, including recyclable, or marketable, non-noxious garbage.

The plaintiffs and the American Paper Institute argue, however, that the increased value of wastes and the City's appropriation of that value render the old cases anachronisms that should be set aside. They argue that changed economic circumstances and heightened environmental concern make separating and selling such recyclable wastes as metal, paper, and cardboard more feasible now than in the past. They point out that there now exist competitive markets for recyclable wastes. They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.

The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious. Landfill areas are running out and causing serious air and water pollution and aesthetic problems. The record demonstrates that this is the problem that caused Akron – a heavily industrial area – to plan and build its energy recycling plant.

Nor can the old cases be distinguished because of changed technology. The Supreme Court and other courts upheld governmental monopoly of solid waste years ago while recognizing explicitly that some wastes have value and could be sold in the market place. The record does not demonstrate

that there has been a substantial change in the relative value of recyclable waste. Paper, cardboard boxes and metal have been a substantial part of garbage for years. We have perhaps become more conscious of the need to conserve and reuse resources, but this fact does not distinguish the old cases.

Neither does the fact that the City appropriates the value and sells some of the recyclable wastes, or chooses in manufacturing energy to burn some of the paper and cardboard rather than resell it, distinguish the old cases. Under these cases, the City could have simply taken over all garbage collection as in San Francisco, Detroit and Cincinnati, depriving existing collectors of any business at all. Here the greater would seem to include the lesser, and the fact that the City adopted a less restrictive alternative is not a valid distinction. Since the private collectors claim that they gave substantial rebates to their customers for the recyclable wastes they sold in the market place, at most the value of the recyclables appropriated by the city represents a licensing fee, service charge or tax imposed on persons in the City who generate and collect garbage.

The requirement that collectors deposit at the plant some valuable wastes, the sale of which supports the costs of incineration and the production of energy, is a valid exercise of the police power. The City may appropriate the value of marketable items abandoned by the owner and mixed in the stream of garbage in order to pay part of the general social costs of waste disposal. In addition Akron, a heavily industrial city, was faced with the loss of its main source of supply of energy for many of its downtown industrial and commercial businesses. The economic and social consequences of interruption in the supply of steam would be serious and justify the exercise of the police power challenged here.

The three cases discussed above also satisfy us that the involvement of the private company, Teledyne, in the operation of the plant in return for one-half of the profits from sale of recyclables is not improper under the takings or due

process clause because it redistributes income from private collectors to Teledyne. In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously been done by several firms. The courts held that the public interest in regulation of the collection of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the takings or due process clause.

III. THE INTERSTATE COMMERCE QUESTION

In recent cases the Supreme Court has developed a test to determine the validity of government actions challenged under the interstate commerce clause. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Minnesota* v. *Clover Leaf Creamery Co.*, 101 S.Ct. 715 (1981). In *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979), the Court presented the test as follows:

> [W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

In the present case, there is no indication that the City's actions are protective measures designed to discriminate against interstate commerce. The appropriation of value under the police power falls on local people who vote in Akron, not on people from out of town. The effect on commerce is minimal. The City continues to sell the recyclable metals in commerce just as did the private collectors. The fact that the city burns some paper and cardboard that would otherwise

be sold in commerce by the private collectors does not discriminate against or substantially burden interstate commerce. The paper is converted to energy that is sold to Akron tire plants and other businesses. The record does not indicate that any national or regional market for paper is substantially affected by Akron's conduct or that supply would be restricted enough to affect prices. The only identifiable costs imposed are local.

Unlike the statutes in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951) (municipal enactment requiring that milk be pasteurized within five mile radius of city violates commerce clause), *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (state law prohibiting importation of garbage into state invalidated under commerce clause as an "economic protectionist" measure designed to impose burden on residents of other states), and other commerce clause cases relied on by plaintiffs, Akron's legislation does not have the effect of taxing or preventing competition by nonresidents. It is not special interest legislation that discriminates against out-of-town people who vote elsewhere in favor of local residents and local voters. The economic costs of the Akron measure fall hardest on people who generate and collect garbage in the City of Akron. Since the Akron ordinance does not discriminate against, or otherwise seriously burden, interstate commerce, the plaintiffs' arguments based on the commerce clause are unpersuasive. Defendants' regulations, therefore, do not violate any of the standards set forth by the Supreme Court in *Pike* v. *Bruce Church, Inc.* and *Hughes* v. *Oklahoma, supra.*

IV. THE ANTITRUST QUESTION

The remaining federalism issue is whether the Sherman Act preempts and displaces local legislation creating municipal monopolies — whether restraning competition in solid waste by local government "stands as an obstacle to the accom-

plishment and execution of the full purposes and objectives of Congress" in enacting the antitrust laws. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Plaintiffs argue that the state action exemption to the antitrust laws first articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943) (upholding a California agricultural program restricting the marketing of raisins in order to maintain farm prices), does not apply to cities unless the state by legislation has explicitly authorized the local anti-competitive conduct and maintains a high degree of supervision over the local conduct.

For this argument the plaintiffs rely primarily on *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a case in which a municipal electric utility sought to force customers who lived outside the city into tying and other anti-competitive arrangements. Four members of the Court in that case agreed that the state action exemption does not protect municipalities from antitrust liability when their anticompetitive actions are not (a) "directed or authorized" and (b) "supervised" by the state as a part of a state policy to substitute regulation or monopoly for competition. *Id.* at 410 (discussing *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)). *Accord, California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Chief Justice Burger concurred specially in the opinion, finding the city subject to liability under the Sherman Act, but his reasoning was entirely different from the other members of the majority. He reasoned that the state action exemption should be inapplicable when cities are engaged in business activity, as distinguished from a governmental function. He viewed the operation of a municipal electric company as an entrepreneurial or proprietary function and therefore subject to the antitrust laws. Four members of the Court dissented on the ground that local governmental bodies are simply not subject to the Sherman Act. Another possible rationale for the decision of the majority arises from the fact that the city was seeking to exercise market or monopoly power outside its corporate

boundaries, that is, outside the area in which it was empowered to act as a government under state law. Although the opinions do not stress this fact, it may turn out that the narrow holding of the case is that a city loses its antitrust exemption if it competes with others outside the boundaries of its governmental authority in an area in which it is not politically accountable.

It is difficult for us to apply the *Lafayette* decision since the plurality and dissenting opinions are each supported by four justices, and no line of reasoning commands a majority of the Court. Whatever principle the Supreme Court may settle on in the future respecting municipal antitrust liability, however, we believe the city of Akron is exempt from the Sherman Act in this case. Garbage collection and the operation of incineration plants are traditional activities of local government. As discussed above, the reported cases, state and federal, have long allowed municipalities to create monopolies and restrain competition in carrying out this function. Moreover, in Ohio, the home rule provisions of the state Constitution, as interpreted by the Ohio Supreme Court in the *Cincinnati* case, *supra*, authorize local government to create a municipal solid waste monopoly. The legal system of the state specifically allows the municipal ordinance in question here, and an agency of the state, the Water Authority, maintains some oversight of the facility. In addition, the City is acting entirely within its own governmental boundaries. It is affecting people to whom it is politically accountable. Finally, the United States government has advised us that this municipal activity is in accord with federal energy and environmental policy as established in the Resource Conservation and Recovery Act, and as practiced by the Environmental Protection Agency and the Department of Energy.[5] These departments are encouraging and assisting cities and towns in

[5] Congress has explicitly found that solid waste represents a potential source of energy and that technology exists to produce energy from waste. It has recognized the need to use wastes "to develop

building such facilities and controlling solid waste collection and disposal.

Scholars have pointed out that the essential conflict of values here is the conflict between the ideals of competition and free markets embodied in the Sherman Act and the principles of federalism contained in the Tenth and Eleventh Amendments.[6] In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court reviewed the limits imposed by the Tenth Amendment upon Congressional authority to regulate state governmental activities under its commerce clause power. The Court held that Congress could not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ." *Id.* at 852. Various courts have since used and refined the *National League of Cities* test to determine which of the multitude of local governmental activities are insulated from federal regulation. *See, e.g. Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) (operation of metropolitan airport an integral governmental function; "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times"); *United Transportation Union* v. *Long Island Ry. Co.*, 634 F.2d 19 (2d Cir. 1980) (provision of commuter rail service an integral governmental function; "not only is [rail service] essential to the public, but it is also essential that the government step in to furnish it"). Although the scope of Tenth Amendment limitations on affirmative congressional action is narrow, Tenth Amendment values should not be narrowly read when Congress has not expressly or by clear implication displaced a traditional exercise of local police power.

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alternative energy sources . . . in order to reduce our dependence" on conventional sources. 42 U.S.C. § 6901(d).

[6] *See, e.g.*, Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context*: Parker v. Brown *in Constitutional Perspective*, 1978 Duke L.J. 389; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. State L.J. 305; Thomas, City of Lafayette's *State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 Ariz. State L.J. 345.

Since solid waste disposal including the regulation of garbage collection, incineration and "recycling" is a customary area of local concern long reserved to state and local governments by practice, tradition and legal precedent, the Sherman Act should not apply. Tenth and Eleventh Amendment values support the authority of local governments to act in this field. Their plenary, governmental power to deal with such local problems affecting the public interest should not be preempted or displaced by general statutory policies favoring an economic model of competition for businessmen and industrialists operating in private markets.

Finally, there is a policy argument that even if defendants may regulate or monopolize the collection and disposal of nonrecyclable, valueless waste — whether for public health and safety or economic reasons — they may not do so for recyclables. This is because once recyclables are separated from the mass of garbage, their transport and reuse cause no danger to the public health and impose no costs upon the community. In addition, a market for recyclables has grown up in recent years, whose development should be encouraged rather than inhibited by the government. Finally, because no market failures exist leading to the creation of a natural monopoly, defendants are not economically justified in their intervention and regulation in the maket for recyclables.

We are uncertain whether or not this argument represents good public policy. The legislators, planners and administrators involved do not agree with it. The planners and legislators for the City, the Environmental Protection Agency and the Department of Energy agree that private markets should be replaced by municipal control of recyclable wastes in this instance. The policy question here, in our judgment, is debatable and should not be taken out of municipal hands by federal courts in the absence of congressional intent clearly expressed.

Accordingly, the judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C78-65A

GLENWILLOW LANDFILL, INC., *et al.*

Plaintiffs

v.

CITY OF AKRON, OHIO, *et al.*

Defendants

Civil Action C78-1733A

HYBUD EQUIPMENT CORPORATION, *et al.*

Plaintiffs

v.

CITY OF AKRON, OHIO, *et al.*

Defendants

Memorandum Opinion And Order

In December 1976, the City of Akron, Summit County, and the Ohio Water Development Authority (OWDA) entered into a cooperative agreement to enable the OWDA to sell $46,000,000 worth of revenue bonds so the City could develop a recycle energy system. To fulfill its obligations under the agreement, the City enacted Ordinance No. 846-1976. The plaintiffs in these two cases allege that certain covenants of the cooperative agreement and the ordinance are illegal because: they deprive plaintiffs of due process of law under the fourteenth amendment;[1] they take property in violation of the

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[1] Although the complaint alleges a claim based on the equal protection clause of the fourteenth amendment to the United States Constitution, that claim has not been discussed by the plaintiffs in any of their briefs to this Court.

fifth amendment to the United States Constitution as applied to the states through the fourteenth amendment; they restrain interstate commerce in violation of Article I, section 8 of the Constitution; they violate Article 18, section 3 of the Ohio Constitution; and they violate sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1-2. The plaintiffs seek declaratory and injunctive relief, and an award of attorney's fees.

The Court has jurisdiction of the action under 28 U.S.C. §§1331, 1337 and 2201. The parties ask the Court to exercise pendent jurisdicton over the state law claim. Venue is proper in this district under 28 U.S.C. §1391(b), 15 U.S.C. §§15, 22. The Court duly heard testimony and received exhibits on May 14, 15, 16, 17 and 18, 1979. The following shall constitute the Court's findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

I. FACTS

The parties have stipulated to the great proportion of the relevant facts.[2] Paragraphs 1 through 50 and 90 through 92 of the pre-trial stipulation are incoporated herein as Appendix A. The remaining porton of the stipulation, paragraphs 51 through 89 and part of paragraph 5, is incorporated herein as Appendix B.[3] The stipulation entered into at trial, paragraphs 4 through 13 of the Ohio Water Development Authority's proposed findings of fact, is incoporated herein as Appendix C. In addition the Court finds the following facts:[4]

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[2] The parties also put 36 depositions into evidence by stipulation. Two of the depositions, those of Ned Oberlin and Richard Bain, were never filed with the Court and are therefore not part of the evidence considered.

[3] Appendix B shall remain under seal as it contains confidential information that is subject to a protective order entered by the Court.

[4] The plaintiffs have moved the Court to reconsider an evidentiary ruling made during the course of trial and have asked the Court to admit portions of the deposition of Kenneth Sheperd and several related exhibits into evidence. The Court declines to alter its prior

1. The city built the RES to solve its solid waste disposal problem. A number of factors, including Ohio Edison's desire to stop generating steam for the downtown business district, caused the city to decide the RES was the best alternative available to solve the waste disposal problem.

2. The underwriters decided it was necessary to assure a supply of waste to the RES in order to market the revenue bonds. After learning this the city and the OWDA concluded that it would be necessary to require that all waste collected within the city limits would be taken to the RES.

A. Sherman Act

When both constitutional and statutory violations are alleged it is preferable for the Court to consider the statutory questions first, thus avoiding advisory opinions on constitutional issues if possible. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). This Court will, therefore, first consider the alleged antitrust violations.

Initially the Court must consider whether the plaintiffs have standing to challenge the covenants and the ordinance on antitrust grounds. The defendants argue that the plaintiffs lack standing to attack the legality of the covenants because the covenants by themselves have no force or effect and cause the

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ruling that the evidence should be excluded under Rule 408, Federal Rules of Evidence, as part of a proposed compromise to end the present litigation. The plaintiff has tried to show that the defendants failed to object to the discovery of these matters and thus waived their right to object to its admissibility, but questions of admissibility — unlike matters of privilege — are not so waived. See Wright & Miller, Federal Practice & Procedure § 2156. Accordingly, the motion for reconsideration is hereby denied. Alternatively, the Court finds that if the deposition and exhibits were held admissible to show bias and prejudice as permitted under Rule 408, the additional evidence would not cause the court to alter any of its findings of fact.

plaintiffs no injury in fact. See *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). But the plaintiffs' antitrust claims include allegations of conspiracy.

Under the Sherman Act an agreement in restraint of trade is illegal. Proof of the actual effect on commerce caused by the conspiracy is not always required to establish a violation of the statute. *E.g., United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940). The cooperative agreement is arguably evidence of an illegal conspiracy in restraint of trade which may be illegal under the Sherman Act without proof of its actual effects. Therefore the Court does not believe that the plaintiffs must show injury in fact caused by the covenants to raise the Sherman Act claims. Furthermore, the enforcement of the ordinance will subject the plaintiffs who collect solid waste within the city to potential criminal penalties if they violate its terms. If injury in fact was a requirement to assert the Sherman Act claims the waste collectors would still have standing to challenge the defendants' agreement under the Sherman Act: arguably they were injured by the ordinance that was enacted pursuant to the covenants of the cooperative agreement.[5]

Regarding the substance of the plaintiffs' antitrust claims, the defendants argue that their conduct is exempt from the operation of the Sherman Act under *Parker* v. *Brown*, 317

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[5] In declaratory judgment actions it is often necessary for the court to examine another facet of the the case or controversy requirement and to determine whether the dispute is ripe for adjudication. The parties do not question, and the Court finds no reason to doubt the ripeness of the instant dispute. See Buckley v. Valeo, 424 U.S. 1 (1976); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *Cf.* Andrus v. Allard, 48 U.S.L.W. 4013, 4017 n.21 (Nov. 27, 1979) ("All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself suffices to give them standing to litigate their interest in the construction of the statutes.")

U.S. 341 (1943), and its progeny. In *Parker* a California raisin grower challenged the California prorate program under the Sherman Act.[6] The Supreme Court assumed that the program would vioate the Sherman Act if it was organized and made effective solely by an agreement between private parties. The act, however, derived its force and effect from the legislative command of the state. The Supreme court found

> nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. Thus, the Court decided that the administration of the California act was not covered by the Sherman Act.

The defendants argue that their conduct is similarly protected for two reasons, first because of the powers granted to the OWDA which make it the state agency with power over waste disposal facilities, and second because of the home-rule powers granted to the City of Akron under state law.

Section 6121.02 of the Ohio Revised Code creates the OWDA.[7] The OWDA's powers with respect to waste disposal

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[6] The California Agricultural prorate Act authorized the establishment of programs for the marketing of agricultural commodities produced in the state, to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The program was administered by a commission of nine persons, eight members appointed by the governor and confirmed by the senate, and the ninth, an *ex officio* member, the state's director of agriculture. 317 U.S. at 346.

[7] The OWDA is made up of eight members. Five are appointed by the governor with the advice and consent of the senate; the state's directors of natural resources, environmental protection, and energy are *ex officio* members. § 6121.02, Ohio Revised Code.

facilities are set out in secion 6123.03 of the Ohio Revised Code:

> It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority . . . to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect sectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, [and] to assist in the financing of solid waste facilities. . . . In furtherance of such public policy, the Ohio water development authority . . . may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies . . . and may issue solid waste revenue bonds of this state payable solely from revenues, to pay the cost of such projects.

The defendants contend that the powers granted to the OWDA within its sphere of authority are comparable to the power granted to the Supreme Court of Arizona over the practice of law, and that their actions should be accorded the immunity recognized in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-63 (1977).

In *Bates* the Supreme Court held that enforcement of the state supreme court's disciplinary rule which prohibited attorneys from advertising in newspapers and other media was exempt from the Sherman Act under the doctrine of *Parker* v. *Brown, supra*. The Court isolated three factors in reaching its conclusion. First, the Court noted that the defendant in *Bates* was the state and not a private party.[8] Second, the Court

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[8] In *Bates*, the state supreme court had promulgated the regulation in question, and the state supreme court was the state agency responsible for overseeing the activities of the bar. This situation can be contrasted with *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975), where the county bar association and the state bar asso-

found that the state of Arizona had an interest in protecting the public that was intimately connected to its regulation of the activities of the bar. Finally, the Court saw in the disciplinary rules a clear articulation of the state's policy with regard to professional behavior, and active supervision and review of the state policy by the responsible state agency. 433 U.S. 361-62.

The Court will assume *arguendo* that if private parties entered into the covenants contained in the cooperative agreement to carry out the terms of the challenged ordinance their actions would violate the Sherman Act. Examining the factors outlined by the Supreme Court in *Bates*, the Court first finds the OWDA is a state agency and that its power to determine state policy concerning the issuance of state revenue bonds for facilities like the RES is supreme. Second, the Court determines that the state has a legitimate interest in promoting safe and sanitary methods of solid waste disposal; the state's concerns, and their relationship to the health and welfare of the people of Ohio, are explained in section 6123.03 of the Ohio Revised Code. The state also has a legitimate interest in giving financial aid to it subdivisions to establish projects that serve these goals without harm to the state's treasury; thus the OWDA's concern for the viability of the RES revenue bonds is a legitimate state concern. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (recognizing the importance of financial considerations in structuring local government services).

Finally, the statutes creating the OWDA and establishing its powers clearly articulate the state's policies. The OWDA ac-

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ciation had adopted minimum fee schedules. Neither of the bar associations was the state agency responsible for regulating the bar and the responsible agency — the state supreme court — had not adopted or enforced the fee schedules, and was not named as a defendant. The Court therefore found that state action was not involved and the Parker exemption did not apply. In *Bates* the state was a party through its agent, the state supreme court.

tively participated in drafting the covenants of the cooperative agreement, and thus played a major role in creating the challenged ordinance which was in all material respects set out in the covenants.[9] In doing this the OWDA was acting for the state under express statutory authority to further the state policies declared in section 6123.03 of the Ohio Revised Code. See also Ohio Revised Code §§ 6123.04, .13 (further describing the powers of the OWDA). The Court concludes that the powers of the OWDA within its sphere of authority are comparable to those of the state agencies examined in *Bates* and *Parker*, and that its activities are outside the reach of the Sherman Act.

The defendants also argue that the city is a subdivision of the state exercising sovereign powers, and that the city's enforcement of the challenged ordinance is within the *Parker* v. *Brown* exemption. The home-rule powers granted to charter cities under the Ohio Constitution are sufficient, in the defendants' view, to give them sovereignty equal to that of the state within their borders. The plaintiffs respond that the Supreme Court has held that the activities of the city of Lafayette, Louisiana are outside the *Parker* v. *Brown* exemption, and that cities in Ohio should not be treated differently solely on the basis of home-rule powers established by state law, citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

The Court in *City of Lafayette* held that a municipal light plant was not within the *Parker* v. *Brown* exemption when it was competing with other power companies in areas outside the city limits. The Justices who found Lafayette's activities were not exempt recognized nonetheless that in some situa-

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[9] The plaintiffs emphasize the role the underwriters played in establishing the need for the ordinance. The underwriters were hired by the OWDA to market the bonds. The fact that the OWDA and the city relied in part on the underwriter's expertise in making their decision to support and enact the ordinance does not make it any less their decision.

tions municipalities may exercise the sovereign powers of the state.

The home-rule powers given to municipalities under the Ohio Constitution authorize charter cities to establish governmental policy within their corporate limits to the extent that the legislature has not set a uniform state policy. Ohio Const. Art. XVIII, § 3. In other words, in the language of *Bates*, the Ohio Constitution declares that cities act as agents of the state when they exercise governmental powers within their city limits. The Ohio Constitution grants these powers in broad terms, and does not explicitly define the scope of a city's power to regulate competition in the sphere of solid waste disposal. Rather than declare a state-wide policy to be implemented by state or local authorities, Ohio's waste disposal policy is to permit local authorities to declare the policy that will control within their borders. The Ohio courts have recognized that local governments are responsible for regulating the collection and disposal of solid waste within their borders — by monopoly if the city finds it appropriate. See *State ex. rel. Moock* v. *Cincinnati*, 120 Ohio St. 500 (1929); *City of Canton* v. *Van Voorhis*, 61 Ohio App. 419 (1939).

The plaintiffs argue that the intent to displace competition must be more clearly enunciated by the state. In *City of Lafayette* the plurality opinion [10] approved the Fifth Circuit's understanding of *Parker*, saying a state mandate to displace competition is present "when it is found 'from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of.'" 435 U.S. 415 (citations omitted). The plurality expressly recognized: "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monop-

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[10] That is, part III of Justice Brennan's opinion. Justices Marshall, Powell and Stevens joined in all three parts of Justice Brennan's opinion; Chief Justice Burger joined in part I of the opinion and in the judgment.

oly basis." 435 U.S. 416-17.[11] Ohio has recognized that municipalites may choose to provide waste disposal services on a monopoly basis. Furthermore, the Third Circuit has said that the intent of the state to restrain competition in a particular area "may be demonstrated by explicit language in state statutes, *or may be inferred from the nature of the powers and duties given to a particular government entity.*" *Duke & Co.* v. *Foerster,* 521 F.2d 1277, 1280 (3d Cir. 1975) (emphasis added). In Ohio the state has delegated to local authorities the power to declare the policy that will control within their borders. The Court does not believe that the state's policy choice is entitled to less weight because it has chosen diversity over homogeneity. This is particularly true in areas of traditional local concern such as the collection and sanitary disposal of solid waste which is the focus of the challenged ordinance.

The Court has thus found, for two alternative reasons, that the challenged activities are exempt from the operation of the Sherman Act. Having decided that the statutory claims will not determine the case, the Court must consider the constitutional issues raised by the plaintiffs.

B. Commerce Clause

The plaintiffs claim that the ordinance impermissibly restricts interstate commerce in violation of the commerce clause, article I, section 8 of the United States Constitution. The commerce clause gives Congress the power to regulate commerce between the states. If there is no federal regulation preempting the field in a particular area,[12] the states are free to regulate so long as the restraints imposed do not transgress

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[11] It is also worth noting that in *City of Lafayette* the anticompetitive activities all took place outside the city limits while the city was engaging in proprietary activity. Here, the plaintiffs challenge an ordinance that is effective only within the city limits and which was adopted to provide the city residents with safe and sanitary waste disposal.

[12] Plaintiffs do not claim any preemption in this case. See Philadelphia v. New Jersey, 437 U.S. 617, 620-21 & n.4 (1978).

the terms of the commerce clause itself. The scope of permissible state regulation is not found in the words of the commerce clause; rather it has emerged gradually through judicial interpretation. See *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623 (1978).

Before proceeding to consider the merits of the plaintiffs' commerce clause claim, the Court must consider whether the parties before it can properly raise these issues. As previously noted, for the plaintiffs to have standing to raise a claim they must assert that the challenged activity causes them injury in fact. *Warth, supra; Eastern Kentucky, supra.* The covenants do not impinge on the plaintiffs' activities in any way. Therefore the Court finds that the plaintiffs do not have standing to challenge the constitutionality of the covenants. The waste collectors will be subject to criminal prosecution if they fail to comply with the terms of the ordinance. They thus have standing to challenge the ordinance under the commerce clause. Because the commerce clause challenge attacks the ordinance on its face and not as applied to any particular plaintiffs, and since the plaintiffs seek only declaratory and injunctive relief, it is unnecessary to consider whether all of the plaintiffs have standing to challenge the constitutionality of the ordinance; a finding that the waste collectors have standing will be sufficient.

In evaluating an ordinance under the commerce clause the Court must ask:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma*, 99 S. Ct. 1727, 1736 (1979). See *Philadelphia* v. *New Jersey, supra* at 624; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The party challenging the legislation

has the burden of showing the discrimination against interstate commerce that is the focus of the first inquiry. *Hughes, supra* at 1736.

The Akron ordinance affects only solid waste that is collected within the city;[13] thus it categorizes waste based on its geographic place of origin. Yet under the ordinance waste originating outside Ohio is not distinguished from Ohio waste originating outside the city limits. In *Hughes, Philadelphia*, and *Pike* the unconstitutional statutes drew lines along the state boundary. The Akron ordinance directly affects only intrastate activities, and any effect on interstate commerce is indirect. Nor do the plaintiffs argue that the ordinance restrains interstate commerce in solid waste. They argue that commerce is restrained in the recylclable materials that can be separated from the solid waste. Since the ordinance acts only on solid waste, any burden on interstate commerce in recyclable goods moving in interstate commerce is indirect and incidental.

The second inquiry for the Court under the commerce clause is whether the ordinance serves a legitimate local purpose. The Akron ordinance serves the legitimate goal of making it possible to build the RES and thus assures the safe and efficient disposal of solid waste generated within the city.[14]

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[13] The plaintiffs argue that the ordinance is subject to two possible interpretations. Under the first construction all persons collecting waste that is generated within the city of Akron must obtain a license to collect waste and must take to the RES all waste material generated within the city that is deemed acceptable for disposal there. Under the second construction the collectors must take all waste generated within the city limits to the RES, and any collector transporting non-Akron waste over Akron streets, avenues, and alleys must take that waste to the RES as well. The Court finds that the language of the ordinance is susceptible only of the first construction, and the Court's analysis of the ordinance is based on this understanding.

[14] The legitimate governmental purposes that support the city's determination to construct the RES are more fully described in conjunction with the Court's discussion of the due process claims, *infra* at 16-17.

Turning to the final inquiry, the Court finds that the plaintiffs have not shown that the city's goals could be served by legislation that would impose a smaller burden on interstate commerce. The plaintiffs do suggest that the city should attract waste to the RES by making it economically advantageous to use the RES. The city considered that possibility, but determined the ordinance was necessary.

As not one of the three parts of the test has been shown, the Court holds that the ordinance is not invalid under the commerce clause.

C. Due Process

The plaintiffs raise two arguments under the due process clause of the fourteenth amendment. First they argue that the ordinance is not sufficiently related to legitimate governmental objectives to pass scrutiny under the due process clause of the fourteenth amendment. Second, they argue that if the ordinance does serve a legitimate public purpose, it effects a taking of their proper y for which they must be compensated as provided in the fifth amendment which is applied to the states through the fourteenth amendment.[15]

Plaintiffs' first argument under the due process clause asks the Court to subject the ordinance to substantive due process analysis: the Court is to determine whether the city's police power regulation has the appropriate and direct connection to the health, welfare, and safety of city residents. *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Patterson* v. *Kentucky*, 97 U.S. 501 (1878). See *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). The defendants argue that the health, welfare, and safety of city residents were motivating factors behind the construction of the RES. Health and safety problems are a constant concern with landfill opera-

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[15] Again the Court notes that the covenants cause the plaintiffs no injury in fact, and they therefore have no standing to challenge their constitutionality.

tions. Health and safety concerns also require that the city maintain a public disposal site to discourage unauthorized dumping of waste within the city limits. The defendants say also that the public welfare required the city to pursue an alternative to landfilling for waste disposal in the Akron area because of the increased difficulties encountered in locating and purchasing suitable landfill sites.

The plaintiffs emphasize the role played by a number of interested private parties: Teledyne, who will operate the RES and receive a portion of its profits (if any); Dillon Read, the firm that headed the underwriting team; Ohio Edison, with an old steam generating facility and downtown customers who need steam. Examining the intent of the council that enacted the city ordinance the plaintiffs stop with the explicit statement within the enactment:

> WHEREAS, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed.

The plaintiffs argue that the ordinance was enacted to promote narrow private financial interests, without a proper public purpose.

The Court finds that the plaintiffs' understanding of the legislative purpose is overly circumscribed and removes the ordinance from its proper context. As indicated by the whereas clause on which the plaintiffs rely, the ordinance cannot be separated from the RES. Likewise, the city's purpose in constructing, and in financing the construction of the RES cannot be separated from the ordinance. The cooperative agreement and the covenants further demonstrate this connection that plaintiffs attempt to deny.

The city's initial concern for a long term solution to the problem of safely and efficiently disposing of solid waste prompted it to explore recylcing and incineration as possible

solutions. Over time, as studies were being conducted and as various alternatives were being explored, many factors entered into the decisionmaking and caused the city to finally settle on the RES as the best available method for solving the local, solid waste disposal problem. The magnitude of the problems the city has encountered with landfilling and the chronology of events convince the Court that the city's motivation in building the RES and enacting the ordinance was not to advance private business interests or to undertake proprietary activity. The private interests and the private parties involved in financing and operating the RES do not negate the overriding public purposes and governmental concerns that caused the city to promote the RES and to pass the ordinance.

In *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner* v. *Michigan*, 199 U.S. 325 (1905), the Supreme Court considered arguments that ordinances regulating garbage collection were unconstitutional deprivations of property. The Court held that the ordinances were valid exercises of the police power and that they did not unconstitutionally deprive the citizens of the several municipalities of their property. The plaintiffs in the instant case have tried to show themselves outside the rule of *California Reduction* and *Gardner* in several ways.

The waste collectors argue that their interest in the waste they collect is different from the interest in garbage asserted by the citizens of a municipality. Plaintiffs say that the ordinance takes something of value from the waste collectors and confers a corresponding benefit on the government. They argue that this attempted regulation must be distinguished from governmental regulation that acts evenhandedly on all citizens to control a nuisance. In this connection the plaintiffs emphasize the differences between the garbage that was being regulated in 1905 and the solid waste and recylclable materials that are regulated by the Akron ordinance. The Court recognizes that there are materials of value within solid waste. It is likewise true that if solid waste is not properly disposed of it

can create the same dangers to the public health, welfare, and safety as the garbage of 1905. Thus the Court concludes, as did the Supreme Court in *California Reduction*, that provisions to assure the proper disposal of waste "cannot be properly regarded . . . as a taking of private property for a public purpose, without compensation, simply because such garbage [or waste] may have had . . . some element of value." 199 U.S. at 323. The Court finds that the ordinance is a regulation adopted to control a nuisance (or potential nuisance) that incidentally impacts on some collectors who separate materials of value from the waste they collect.

The plaintiffs do recognize that "[t]he public interest addressed by the RES is the need of the Akron community to have a satisfactory waste disposal facility." But, they say: "the RES does not address any perceived problem in the business activities of the Plaintiffs." If perceived problems in the business activities of the plaintiffs were the justification for the ordinance, then the lack of any perceived problem in their business activities would seem to be a matter for the Court's concern. The ordinance is, however, part of the city's broader scheme to dispose of waste in a safe and sanitary manner at the RES. The ordinance is a reasonable means to achieve this legitimate goal.

Citing *Moore* v. *City of East Cleveland, supra* the plaintiffs argue that the ordinance's relation to this broader public purpose is not sufficient to sustain it. They say that the ordinance must be subjected to a more rigorous scrutiny before the Court can call it proper means to achieve a legitimate end. In *Moore* the Supreme Court invalidated a local zoning ordinance [16] explaining that:

> When a city undertakes such intrusive regulation of the family . . .; the usual judicial deference to the legislature

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[16] Mrs. Moore lived with one of her sons, his son, and another grandson; the two grandsons were first cousins. Because her household did not comply with the definition of family in the local zoning ordinance, Mrs. Moore was convicted of a criminal offense.

> is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." . . . . Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

494 U.S. at 499 (citations omitted). The plaintiffs have not shown that the ordinance interferes with their interests in a manner that is comparable to the intrusion into matters of personal and family choice that were at issue in *Moore*.[17] The "usual judicial deference to the legislature" is therefore appropriate.

Having found that there is a legitimate public purpose for the ordinance, the Court must address the plaintiffs' second argument under the fourteenth amendment, and determine whether the ordinance takes their property for a public purpose without affording them the just compensation required by the fifth amendment.

The plaintiff waste collectors argue that under Ohio law the waste they collect is abandoned property and that, once it is put in their trucks, they own the waste. Before the ordinance the collectors were always free to take their waste, i.e. their property, to any disposal site they chose. By mandating that they take the waste to the RES the waste collectors claim that the ordinance takes their property without giving them compensation.

The Court notes, however, that the collectors collect waste within the city of Akron only after they have obtained a

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[17] As discussed *infra* at 20-25 the Court finds the plaintiffs have not established that the ordinance interferes with any property interest protected by the Constitution. Plaintiffs have not attempted to show that the Akron ordinance interferes with any protected liberty interest.

license to do so. Under the ordinance the city will not seize the waste that is now in the trucks nor the waste in the transfer station. The ciy is regulating where the waste may be taken for disposal. Before the effective date of the ordinance the collectors are free to choose from among several disposal sites. The ordinance removes that choice, and collectors who continue to collect solid waste in Akron while the ordinance is in force will have to abide by its terms. The ordinance takes from the waste collectors the expectation that they would always be able to take the waste they collected within the city to a disposal site of their choice. The plaintiffs have not shown that this is a property right requiring protection under the fifth amendment.

Property rights that are protected by the federal constitution are defined by reference state law or common law. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577-78 (1972). The plaintiffs rely on a series of state court cases where the courts found that regulations similar to the ordinance at issue here impermissibly interfered with the property rights of landfill owners. *Parker* v. *Provo City*, 543 P.2d 769 (1975); *Acme Disposal Corp* v. *Southeast Berrien County Landfill Authority*, Case No. 75-2130-CE (Mich. Ct. App. Oct. 23, 1975); *Thompson* v. *County of Blue Earth*, Case No. 37447 (Minn. Ct. App. May 28, 1974). Those courts, did not, however, describe the property interest they found it necessary to protect, nor did they offer analysis to support their result. This Court finds them unpersuasive. The plaintiffs have also failed to explain what property interest of the waste collectors this Court should protect based on those authorities.

In the procedural due process context, the Supreme Court has recognized that actions of governmental entities can foster expectations that may ripen into property rights. In *Board of Regents of State Colleges, supra*, an assistant professor at a state university challenged the university's decision not to rehire him for another year claiming he had not been given the procedural due process to which he was entitled. The Court found that the had been teaching under a one year employ-

ment contract, and there were no statutory or administrative standards defining eligibility for re-employment. The Court held that the teacher had not shown any property or liberty interest that was infringed when he was not given a new contract. Considering a similar due process challenge by another teacher in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court found that the teacher, whose contract was not renewed, had alleged facts that raised a genuine issue as to his interest in continued employment at the college. The teacher's reliance on a *de facto* tenure program described in official policy statements issued by the college suggested a possible property interest in continued employment. The plaintiffs have not shown that the waste collectors' expectations were fostered by any official statement. The Court does not find that the expectations are a ligitimate claim of entitlement that requires the protection of the fifth amendment.

The landfill operators and Budoff Iron and Metal, which operates the transfer station, have shown that the ordinance causes them injury by forcing solid waste to the RES that would otherwise come to them, depriving them of tipping fees and reclyclable materials. These plaintiffs therefore have standing to challenge the ordinance.[18] As they may have property interests that are protected by the fifth amendment in situations where the waste collectors do not, it is necessary to examine their fifth amendment claims separately.

These plaintiffs rely on the same series of state court cases that the court has already determined to be unpersuasive. The transfer station and the landfills merely had the expectation that the waste collectors would continue to bring waste from the city of Akron to them for disposal. They have not shown that this expectation rises to the level of a legitimate claim of entitlement or other property interest protected by the fifth amendment.

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[18] For the other constitutional claims previously examined the arguments raised by the waste collectors were no different from the arguments of the landfill operators. Thus, it has been unnecessary until this point to examine the standing of the landfill operators.

Alternatively, accepting the argument of the waste collectors that the ordinance impacts on their ability to dispose of the waste they collect which is part of the traditional property concept of ownership, the Court finds nonetheless that this is not a compensable taking under the fifth amendmnent.

In zoning cases where governmental regulation affects real property interests it is well established that reasonable restrictions imposed for the health, welfare, and safety of the population are not unconstitutional deprivations of property; rather, they have been held to be legitimate exercises of the police power. *E.g., Village of Euclid* v. *Ambler Realty*, 272 U.S. 365 (1926); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). Similarly, in *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979), the Supreme Court held that a regulation prohibiting the sale of artifacts containing eagle feathers was not a taking for which compensation was required. The Court said that "governmental regulation — by definition — involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or exploitation of private property." *Id.* at 4017.[19] In considering the plain-

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[19] Having noted that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate" the Supreme Court analyzed the regulation at issue:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. (citations omitted). The plaintiff waste collectors may argue that more than one strand has been taken from their bundle: they do not have the right to donate or devise the waste they collect and the Akron ordinance does therefore accomplish a taking for which compensation must be paid. Analogizing to the zoning context, the Court

tiffs' first claim under the due process clause the court has determined that the ordinance is a proper exercise of the city's police powers. The Court likewise concludes that the ordinance is not a taking for which compensation must be paid under the fifth amendment.

D. State Constitutional Claim

The plaintiffs' final claim is that the ordinance violates the state constitution. Article XVIII, section 3 of the Ohio Constitution provides:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The plaintiffs' position is that the extraterritorial effects of the ordinance are so extensive that the ordinance effectively regulates matters outside the city limits and violates this constitutional provision.

Plaintiffs rely on a Minnesota case, *Wayne* v. *County of Blue Earth, supra,* saying that the Ohio courts would reach a similar result and invalidate the local ordinance under the state constitution. As is apparent from the plaintiffs' brief, however, the Minnesota court was interpreting the due process clause of the state constitution. The Ohio constitutional provision at issue here is very different.

The Ohio case of City of *Canton* v. *Whitman,* 44 Ohio St. 2d 62 (1975), is likewise inapposite because that case presented a clash between the uniform state policy of the state environmental protection agency, which required fluoridation, and

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finds that the owners of the eaglefeather artifacts are in the posture of a property owner with a noncomforming use. In contrast, the waste collectors who chose to pay for a waste collection license in Akron when the ordinance is in effect are in a posture comparable to a new owner who has purchased a home subject to the zoning ordinance. The ordinance restricts the waste collectors, but it is not a taking.

the city's decision not to add fluorides to the city water supply. Here there is no similar clash. Akron's ordinance was in fact supported by the OWDA, the state agency responsible to promote waste disposal facilities.

The Court finds that the Akron ordinance regulates waste collection and disposal within the city limits and is a proper exercise of the city's home rule powers under the Ohio Constitution.

E. Conclusion

Having found that the activities of the defendants are exempt from the Sherman Act under the doctrine of *Parker* v. *Brown*, that the ordinance does not violate the commerce clause, or the fourteenth amendment to the United States Constitution, and that the ordinance is not in violation of Article XVIII section 3 of the Ohio Constitution, the Court concludes that judgment shall be entered for the defendants and against the plaintiffs on all claims.

IT IS SO ORDERED.

LEROY J. CONTIE, JR.

Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX A

Jurisdiction and Venue

1. All defendants admit the jurisdictional allegations of the consolidated complaints except that OWDA denies the jurisdictional basis for plaintiffs' 42 U.S.C. §1983 claim against it.

2. Venue is proper in this district by virtue of 28 U.S.C. Section 1391(b), 15 U.S.C. Section 15, and 15 U.S.C. Section 22. All defendants either inhabit, transact business, reside or are found in this district and all claims asserted have arisen in this district.

The Plaintiffs

3. Plaintiff Glenwillow Landfill Inc. (hereinafter "Glenwillow") is a private corporation organized and existing under the laws of the State of Ohio. Plaintiff Portage Landfill Inc. (hereinafter "Portage") is a sole proprietorship. Plaintiffs Glenwillow and Portage operate sanitary landfill disposal sites located in the Counties of Cuyahoga and Portage, Ohio, respectively. These disposal sites, which are licensed pursuant to Ohio Revised Code, Chapter 3734, are open to the public for the disposal of solid waste materials. Parties depositing waste materials at Glenwillow and Portage disposal sites pay said plaintiffs a fee based on the quantity of waste deposited. Accordingly, a significant portion of the income derived by said plaintiffs from the operation of their disposal sites is attributable to the deposit of solid waste materials. As of June 1, 1978, Glenwillow maintained a tipping charge of approximately $4 to $5 per ton. As of January 1, 1978, Portage maintained a tipping charge of approximately $4.40 per ton.

4. Plaintiff J. R. Hawley Sanitation, Inc. (hereinafter "Hawley") is a private corporation organized and existing under the laws of the State of Ohio. Plaintiff Kovach Sanitation (hereinafter "Kovach") is a sole proprietorship. Plaintiffs Hawley and Kovach are haulers of waste material, licensed by the City of Akron, Ohio, and own and operate waste collec-

tion vehicles, waste containers and related waste collection equipment in the City of Akron, Ohio, in Summit County outside the City and in areas outside the County. Under the terms of various agreements between said plaintiffs and certain industrial and commercial concerns situated within and outside the City of Akron, Ohio, said plaintiffs covenant to remove the waste materials generated by said concerns, in return for which said plaintiffs receive a fee, based on the quantity of waste removed therefrom.

5. Plaintiff Hybud Equipment Corp. (hereinafter "Hybud") is a private corporation organized and existing under the laws of the State of Ohio and is a hauler of waste material, licensed by the City of Akron and other jurisdictions in which it operates which require licenses. Hybud owns and operates waste collections vehicles, waste containers and related waste collection equipment in the City of Akron and County of Summit, Ohio, and in several contiguous counties in Ohio. Under the terms of various agreements between said plaintiff and certain industrial and commercial concerns situated within the City of Akron and County of Summit, Ohio, and in contiguous counties in Ohio, said plaintiff covenants to remove the waste materials generated by said concerns, in return for which said plaintiff receives a fee, based on the quantity of waste removed therefrom. Plaintiff Hybud also designs and manufactures solid waste containers and compactors and other types of waste handling equipment, some of which it places or leases at the location of its customers in and outside the City of Akron and the remainder of which it sells to third parties. Plaintiff Hybud has also sold bags for containment of solid waste to its customers and to others from time to time.

. . .

6. Plaintiffs Hawley, Kovach and Hybud presently operate some collection routes in which solid waste collected in the City is mixed in the same trucks with waste collected outside the City.

7. Plaintiff Budoff Iron and Metal Corp. (hereinafter "Budoff") is a private corporation organized and existing under the laws of the State of Ohio. Said plaintiff owns and operates a transfer station within the City limits of Akron, Ohio. Budoff (a) receives at the transfer station "source segregated" cardboard and waste materials containing recoverable cardboard and metal, most of which is collected by plaintiff Hybud in Akron, Summit County and contiguous counties in Ohio; (b) removes therefrom cardboard and metals, (c) sells such recovered materials to paper and scrap metals dealers (or other customers) and (d) disposes of the residue of unrecovered waste materials at a landfill.

The Defendants

8. Defendant City of Akron is a charter municipality in Ohio. The City encompasses an area of 54 square miles. In 1976, its population approximated 269,000.

9. Defendant John Ballard is the Mayor of the City of Akron, Ohio.

10. Defendants Ray Kapper, Elsie Reavan, James R. Williams, Tim David, Vincent Ciraco, Robert L. Goehler, Reginald K. Brooks, Kathleen Greissing, Robert J. Otterman, Mickey Eritano, Jr., John V. Frank, Don Plusquellic and William C. Grimm, or their duly appointed or elected successors, are residents of the City of Akron and members of the Akron City Council, being duly elected in accordance with the City's Charter.

11. Defendant Robert Edwards is the Public Service Director for the City of Akron.

12. Defendant Summit County ("the County") is a county organized and existing under the constitution and laws of the State of Ohio, containing approximately 416 square miles, and having a population, as of 1976, of approximately 535,000 persons.

13. Defendants Mark Ravenscraft, Ted Cole and Don Stephens, or their duly elected or appointed successors to of-

fice, are residents of the County and comprise the Board of Summit County Commissioners, being duly elected in accordance with the laws of the State of Ohio.

14. Defendant Ohio Water Development Authority ("OWDA") is "a body corporate and politic of the State of Ohio," created by Chapter 6121 of the Ohio Revised Code.

Nature of the Akron Area Waste Business

15. The residents and businesses located in the City of Akron and in Summit County, Ohio, generated approximately 1300 tons of solid waste material daily in 1976. Single and two-family residential waste generated in the City of Akron is either collected by City trucks or by private trucks operated by a firm under contract to the City and licensed by the City. Virtually all other residential solid waste, as well as solid waste generated by commercial or industrial establishments in the City (hereinafter sometimes referred to as "commercial waste"), is collected by private firms, licensed by the City, which contract directly with these customers.

16. Residential waste collected by City trucks or firms under City contract presently is disposed of at the Hardy Road Landfill operated by the city, which charges a fee for all waste it receives based upon volume. Private firms collecting residential waste, but not under City contract, or commercial waste in the City or County are presently, and always have been, free to take such material to whatever public or private disposal site they find most economical, whether inside or outside the City or County. Collectors are also presently, and always have been, free to separate, process, recycle or resell any such waste material they collect.

17. The public and private landfills, including plaintiffs, now operating in the Akron-Summit County area required to hold permits under State law and are inspected by County or Municipal Boards of Health and by the Ohio EPA. Private landfills in this area have competed among themselves and with public sites to attract waste material in the past and do so presently as well.

The Recycle Energy System

18. During the period 1950 to 1970, the City operated a series of facilities within its corporate limits to dispose of solid waste generated in the City and neighboring communities; specifically:

Facility	Inclusive Dates of Operation
Evans Avenue incineration plant	Closed 1954
Landfill at Robinson Clay Products Clay Pit	1952-1955
Kelly Avenue Landfill	1955-1963
Cuyahoga Street (North of Tallmadge Parkway) Landfill and Peck Road Landfill	1963-1968
Cuyahoga Street (Near the Workhouse) Landfill	1969-1970

In addition to the City's facilities, the City of Barberton operated an incinerator and there were a number of disposal facilities located throughout the County.

19. In the late 1960's, officials in Akron and Summit County foresaw a need for new solid waste disposal facilities, principally triggered by two factors:

(1) The solid waste disposal regulations (effective July 1, 1968) adopted by the Public Health Council (now EPA) pursuant to the Ohio Waste Disposal Act (Chapter 3734, Ohio Revised Code) placed substantial constraints on future location and operation of waste disposal sites.

(2) The Cuyahoga Street Landfill, then the only sanitary landfill in the County, was fast filling up.

20. The need for new facilities was discussed at several meetings between the Mayors of Akron, Cuyahoga Falls and Barberton during the first quarter of 1968. Beginning in mid-1968, representatives of the County participated in these meetings.

21. The City's Department of Planning and Urban Renewal ("Planning Department") undertook, in early 1968, a Comprehensive Regional Waste Disposal Study ("the Study") to find a long-term solution to disposing of solid waste in the Akron area. The Planning Department considered a number of alternative means to effect a long-term solution, including sanitary landfill, transfer stations, incineration, composting, railhaul to strip mines, etc. Part 1 of this Study, dated August, 1968, was devoted to sanitary landfills. In preparing this study, City employees inventoried existing disposal facilities both within and outside of Summit County. They also studied 102 potential landfill sites within Summit County, but concluded that only 7 of these sites, all located in the southern part of the County, were feasible for landfill development based on the criteria of the study.

22. As part of its study, the City also helped finance and participated in a solid waste railhaul study sponsored by the American Public Works Association to research the technology and feasibility of hauling compacted solid waste to strip mines for disposal.

23. In May, 1968, representatives of the City took a field trip to New York and New Jersey to study the operation of solid waste incinerators in three communities. In late 1968, the Planning Department prepared a rough draft of Part 2 of its study devoted to incineration.

24. In February, 1969, the City appropriated $22,000 to hire Glaus, Pyle & Schomer to undertake a "Study Of The Methods And Feasibility Of Incineration For Waste Disposal" including "[a]nalysis of waste heat recovery possibilities and consideration of waste heat recovery to offset expenses." Glaus, Pyle concluded that the technology for constructing

and operating a "Recycle Energy System" (RES) to convert solid waste to steam or electricity was available but economically unfeasible at the time. Consequently the Glaus, Pyle study was shelved in September, 1969.

25. Meanwhile, the expected closing of the Cuyahoga Street Landfill created an immediate need to find a new disposal site. In meetings between officials of the County and City, alternative solutions were discussed. In early 1969, officials of the City and County agreed to cooperate in creating a new landfill to be operated by the City as a regional project. In March, the Commissioners created a Garbage and Refuse Disposal District consisting of all of the unincorporated territory in the County pursuant to Title 343 of the Ohio Revised Code to facilitate the establishment and operation of a new regional landfill site; and the City decided to establish a new sanitary landfill on a site it owned on Hardy Road in Northampton Township. In May, 1969, the Township Trustees filed suit against the City to enjoin a landfill operation on the Hardy Road site (*Leo Blower, et al.* v. *The City of Akron,* Summit County Case No. 276209), and the Court issued a preliminary injunction partially enjoining the acceptance of solid waste at the Hardy Road landfill site. This litigation was ultimately settled by agreement dated December, 1969, pursuant to which the City agreed to cease operating a landfill at the Hardy Road site at the expiration of five years, with a provisional right to operate for an additional three years if it had "operated the landfill strictly in accordance with applicable laws and regulations" during the first five year period. On April 21, 1970, the Board of Summit County Commissioners adopted Resolution 441-70, authorizing an agreement between the County and the City of Akron for the opening, operation and maintenance of the Hardy Road Landfill by the City of Akron as a waste disposal facility within Garbage and Refuse Disposal District No. 1.

26. The Hardy Road landfill opened for business in June, 1970. Total annual tonnage disposed of at the landfill from 1971 through 1978 is as follows:

Year	Tons*
1971	79,000
1972	70,988
1973	101,958
1974	164,325
1975	239,900
1976	239,399
1977	272,273
1978	284,122

* The scales at Hardy Road periodically fail to operate. Consequently, actual tonnage delivered exceeds these figures.

The landfill has generated complaints from some area residents, the County Board of Health and the Ohio EPA. In 1975, Northampton Township again filed suit to shut down the landfill (*Board of Trustees of Northampton Township* v. *City of Akron,* Summit Co. C.P. Case No. 7592121); and in 1977, the County Board of Health instituted a proceeding to revoke the City's license to operate the landfill. In 1978, the City succeeded in annexing the Hardy Road site and contiguous land, thereby relieving it of its contractual obligation to the Township to discontinue landfill operations on the site that year.

27. In 1970 and 1971, the Planning Department continued its study, investigating a number of new technologies to dispose of solid waste, including pyrolosis, the generation of gas from solid waste. Among other things, City officials visited RES projects in Montreal, St. Louis, Chicago and Rochester.

28. In February, 1971, Ohio Edison petitioned the Public Utilities Commission to abandon its steam heating system in Akron because it was unprofitable to Ohio Edison and because the Company was faced with substantial new capital re-

quirements to meet tightened state air emission standards. The PUCO ultimately denied this petition. That same month, Council authorized the Planning Department and Glaus, Pyle to undertake an RES preliminary feasibility study.

29. In July, 1971, the Planning Department issued its "Comprehensive Regional Waste Disposal Study." The report summarized existing solid waste disposal facilities in the County and concluded that they would be filled by 1978. The report then examined alternative methods for providing a long-term solid waste disposal solution including:

(1) sanitary landfill;

(2) incineration;

(3) composting of solid waste;

(4) rail haul;

(5) size and volume reduction methods (shredding and crushing); and

(6) resource recovery techniques.

In August, 1971, Glaus, Pyle issued its RES report entitled, "Feasibility Study of Solid Waste Reduction Energy Recovery."

30. In the year following issuance of the Planning Department and Glaus, Pyle reports, the City's administration took the proposed RES project under advisement. In September, 1972, after a visit to the RES steam plant in Hamilton, Ontario, Mayor Ballard indicated support for the RES project. On October 2, Council held a public hearing on the project; on October 17, the City's Health Commission approved and supported the project. In November, Council passed a resolution inviting proposals from engineering firms interested in designing the project. In April, 1973, after considering a number of alternative technologies, Council authorized the administration to retain Glaus, Pyle to design an RES project at a cost not to exceed $710,000.

31. In May, 1974, the City's Planning Department issued a report entitled "Solid Waste Disposal in the Akron Area." In June, 1974, Glaus, Pyle issued its Preliminary Phase Report on the RES plant. In December, 1974, final plans and specifications for the RES project were completed. In December, 1974, construction contracts were let out for bid; and in February, 1975, the City received bids on all construction contracts for the project.

32. Commencing in March, 1975, the City, its bond counsel and its financial consultant began formulating concrete plans to finance the project by the issuance of revenue bonds. It was recognized that one element of the project's feasibility was its ability to obtain sufficient solid waste of adequate BUT content over the term of the bonds. To provide an assurance of supply, Council authorized the Director of Public Service to contract with "other units of local government and/or private firms for the deposit of trash and garbage for disposal at the recycle energy system."

33. In mid-1975, the underwriters advised the City that its proposed RES revenue bonds would not be marketable. Consequently, the City asked the Ohio Water Development Authority ("OWDA") to finance the project. OWDA agreed to finance the project at its September 11, 1975 meeting. Construction contracts were immediately awarded to the low bidders subject to obtaining financing for the project. However, in early November, 1975, counsel for OWDA opined that the City could not secure the OWDA's bonds from its general fund, and, therefore, the proposed financing had to be restructured. In the succeeding months, the underwriters unsuccessfully attempted to restructure the financing. In the course of time, the City began looking for new underwriters. In July, 1976, Dillon, Reed & Co. agreed to head a new underwriting team to purchase and resell the OWDA's RES bonds.

34. The new underwriting team substantially restructured the proposed financing in an effort to make the

OWDA's bonds for the RES project marketable. Among other things, the underwriters:

(1) renegotiated the steam contracts with B. F. Goodrich, Akron University and Akron City Hospital to provide stronger long-term guarantees; and

(2) required the creation of a separate $10,000,000 Project Contingency Fund to cover construction cost overruns.

The steam contracts were successfully renegotiated and the City created the $10,000,000 Project Contingency Fund by committing $5,000,000 of its own general obligation money and obtaining the County Commissioner's agreement to commit $5,000,000 of the County's general obligation money to the contingency fund.

35. The Project, to be located in, operated and owned by, the City of Akron, entered construction in December, 1976, and is scheduled to commence operation in September, 1979. It essentially consists of a solid waste shredding facility, classification and separation facilities, three industrial spreader-stokers and boilers capable of employing shredded solid waste as fuel to create steam, and existing and proposed steam distribution lines and systems located in the City of Akron, Ohio. The Project is to provide steam to many of the some 200 businesses and other energy customers presently buying steam from Ohio Edison and to other energy customers as well. Already signed to long-term contracts with the Project are approximately thirty area businesses, including B. F. Goodrich Company, and other energy customers. The Project will remove from waste it receives ferrous scrap and will seek to sell such scrap in existing markets for such material. The Project will also, if and when economically feasible, extract other metals and non-metallic waste components for sale. Defendant City has projected that revenues of the RES from the sale of ferrous material for the first year of operation of the RES will be approximately $681,000 and will increase in subsequent years.

36. On November 10, 1976, the City entered into a contract with Teledyne National, a division of Teledyne Industries, Inc. ("Teledyne"), a California corporation, to supervise construction of the Project and then to operate it for a five-year term, renewable at one-year intervals thereafter if both parties agree. Teledyne's contract includes a basic $360,000 fee, plus certain incentives, for construction supervision and a cost reimbursement plus $150,000 fixed fee arrangement for operation. In addition, Teledyne will receive half of all gross revenues of the Project attributable to sale of recovered ferrous and other materials in excess of certain minimum revenues and related expenses. The approximate volume of solid waste presently being brought to the Hardy Road Landfill from all sources is 1300 tons per day. The Project is designed to process up to a maximum of 2240 tons of solid waste per day. It is Teledyne's present intention to operate at the level of approximately 1400 tons per day.

37. An incentive to Teledyne in entering the contract to operate the RES was its agreed share of revenues from ferrous or other recoverable sales. Based on guidelines to be issued by the City, Teledyne will designate waste materials that are acceptable to the Project.

The Cooperative Agreement

38. On October 4, 1976, Council authorized the City to enter into a Cooperative Agreement with OWDA and the County to finance the RES facility. On October 14, the Board of County Commissioners authorized the county to execute the Cooperative Agreement by Resolution 1381-76. Section 5.5 of this agreement provides that the City ("LGA") covenants with the OWDA for the benefit of the bond holders that:

> "H. The LGA will not establish, construct or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available and which the OWDA determines to be detrimental to the Project, and,

further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. The LGA System shall not charge to or collect from the Project any charge for the haulage or disposal of (i) any Solid Waste residue remaining after processing by the Project and (ii) any Solid Waste which is delivered to the Project and which is not suitable for incineration by the Project or resource recovery, and the LGA shall be responsible for the disposal of such Solid Waste.

I. For the term of this Agreement, the LGA shall require that all collectors and haulers of Solid Waste within the LGA be licensed by the LGA and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the LGA which is acceptable for disposal by the Project to be delivered to the Project for disposal through the Project and require that such haulers and collectors and the LGA pay or cause to be paid the fees and charges imposed by the LGA for the disposal of Solid Wastes at the Project. The LGA will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the LGA and which is acceptable for disposal by the project, to be delivered to the Project for disposal through the Project.

* * *

"O. . . . The LGA shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the Project at a level which assures an adequate supply of Solid Waste for the purpose of the Project and, subject to the foregoing, shall be comparable with competitive charges for such services. . . ."

Under Section 5.6 of the Cooperative Agreement, the County covenants with OWDA for the benefit of the bond holders that:

"A. The County will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment which OWDA solely determines to be detrimental to the Project of Solid Waste which is acceptable for disposal by the Project and for which the Project has capacity available, and further to the extent legally permissible, it will oppose the establishment, construction or operation of such facilities.

"B. The County will take all legally available action, administrative, judicial and legislative, to cause all Solid Waste generated within the County and which is acceptable for disposal by the Project and for which the Project has capacity available, to be delivered to the Project for disposal through the Project."

39. Contained in section 6.10 of the Cooperative Agreement are the following warranties and representations made by the County in entering into the Cooperative Agreement:

(a) The County is a county duly organized and existing under the laws of the State, is not in violation of any provision of the Constitution or laws of the State relevant to the transactions contemplated by this Agreement or the Indenture.

(b) The County has full power and authority to execute and deliver this Agreement and to carry out the transactions contemplated thereby. This Agreement and such contracts have by proper action been duly authorized, executed and delivered by the County and all steps necessary have been taken to constitute this Agreement a valid and binding obligation of the County.

(c) The execution, delivery and performance by the County of this Agreement and the consummation of the transactions contemplated hereby will not violate any provision of the constitution, law, resolution or regulation applicable to the County, or of any writ or decree of any court or governmental instrumentality, or of any indenture, contract, agreement or other undertaking to which the County is a party or which purports to be binding upon the County or upon any of its assets.

40. Counsel for the County states that the County has taken no action to implement its covenants under Section 5.6 of the Cooperative Agreement. None of the other parties to this suit is aware of any such action by the County.

41. The Cooperative Agreement was signed by the City, the County and OWDA effective December 1, 1976.

42. On December 6, 1976, OWDA issued an Official Statement noticing the offering of $46,000,000 of special obligation bonds to finance the acquisition, construction and equipping of the Project. Contained in the Official Statement is a restatement of the Cooperative Agreement.

The Ordinance

43. On October 4, 1976, prior to but in contemplation of and for the purpose of giving effect to the covenants undertaken by the three governmental entities in the Cooperative Agreement, the Council of the City of Akron, Ohio, passed Ordinance No. 841-76 (hereinafter "Ordinance"). This Ordinance, which amends Section 850.06, 1068.06 and 1068.14 of the Codified Ordinances of the City of Akron (hereinafter "Codified Ordinances"), revised licensing requirements and service charges with respect to the collection and disposal of garbage and rubbish within the City of Akron. Specifically, Section 1(a) of the Ordinance amends Section 850.06 of the Codified Ordinance as follows:

> "(a) Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor."

Section 2 of the Ordinance amends Section 1068.06 of the Codified Ordinance as follows:

> "No person, except duly authorized collectors of the city or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the

same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal."

Section 3 of the Ordinance establishes a collection and disposal fee for garbage and rubbish generated within the City's limits during the calendar year 1978. Section 3 also provides that:

"[t]he Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with consent of Council to adjust such charge upward on January 1, 1979 or on January 1 of any year thereafter."

44. The prefatory language contained in the Ordinance states:

"Whereas, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed."

Effect of the Ordinance

45. Collectors and transporters of solid waste in the City presently holding licenses issued by defendant City, including plaintiffs Hawley, Kovach and Hybud, and persons who may in the future apply for and obtain such licenses, shall be required, as a condition of such licenses, after the RES commences operation, to bring to RES all solid waste collected in the City and which the City determines to be acceptable for RES, and to pay RES such fees for disposal there as the City shall establish from time to time. Persons holding such licenses who fail or refuse to comply with said requirements shall be subject to potential loss of such licenses, in which case

they will be prohibited from collecting or transporting solid waste in the City of Akron, or they may be subject to criminal prosecution by the City. Parties who collect solid waste within the City without licenses as prescribed by the Ordinance will be subject to criminal prosecution.

46. Solid waste "acceptable for disposal" by the RES, as prescribed in the Ordinance, shall include all solid waste generated in the city other than hazardous wastes or certain items the RES is not equipped to handle. Such rejected items will not include paper, cardboard or most other combustibles or most materials containing ferrous or other recoverable metals.

47. The Ordinance will prevent plaintiffs Hawley, Kovach and Hybud, or any other persons holding City licenses, from taking solid wastes subject to the Ordinance (i.e., solid waste collected within Akron which is acceptable for disposal at RES) to private or public disposal facilities outside of the City after RES commences operation, including plaintiffs Glenwillow and Portage.

48. To the extent plaintiffs Hawley, Kovach or Hybud, or any other collectors presently, or in the future, holding licenses from the City, may, due to economic or other competitive or business factors, seek to engage in the separation of paper, cardboard, metals or other materials from the solid waste they collect that is subject to the Ordinance, for the purpose of selling such recovered materials for profit, the effect of the Ordinance will be to prevent said collectors from doing so.

49. To the extent public or private entities located in Ohio or outside Ohio may wish to purchase materials recovered from solid waste subject to the Ordinance, and to the extent they would otherwise be able to do so but for the Ordinance, the effect of the Ordinance will be to prevent them from doing so, other than directly or indirectly from the RES.

50. To the extent plaintiff Budoff or any other firms in Ohio may purchase or otherwise receive solid waste subject to the Ordinance, and to the extent they would otherwise be able to do so but for the Ordinance, the effect of the Ordinance will be to prevent them from receiving such solid waste.

90. The City, County and OWDA participated in the issuance of $46,000,000 in revenue bonds.

91. The bonds described in ¶ 90 were purchased by persons inside and outside Ohio.

92. Defendant City will offer for sale to customers inside and outside of Ohio ferrous material recovered by RES from Akron solid waste.

APPENDIX C

B. Emergence of The Akron-Summit County Solid Waste Disposal Problem and Genesis of RES

4. Single and two-family residential waste generated in the City of Akron is either collected by City trucks or by private trucks operated by a firm under contract to the City which is licensed to collect and haul solid waste in the City. Virtually all other solid waste generated in the City, including commercial and industrial solid waste is collected by private firms licensed by the City to collect and haul solid waste within its corporate limits. During the period 1950 to 1970, the City operated a series of facilities within its corporate limits to dispose of solid waste generated in the City and neighboring communities; specifically:

Facility	Inclusive Dates of Operation
Evans Avenue incineration plant	Closed 1954
Landfill at Robinson Clay Products	1952-1955
Kelly Avenue Landfill	1955-1963
Cuyahoga Street (north of Tallmadge Parkway) Landfill and Peck Road Landfill	1963-1968
Cuyahoga Street (Near the Workhouse) Landfill	1969-1970

In addition to the City's facilities, the City of Barberton operated an incinerator and there were a number of open dumps located throughout the County.

5. In the late 1960's, it became apparent that the Akron-Summit County area would soon be facing a serious waste disposal problem, principally triggered by two factors:

(1) The solid waste disposal regulations (effective July 1, 1968) adopted by the Public Health Council (now EPA) pursuant to the Ohio Waste disposal Act (Chapter 3734, Ohio Revised Code) outlawed the open dumps being operated in the County and placed substantial constraints on future location and operation of waste disposal sites.

(2) The Cuyahoga Street landfill, then the only sanitary landfill in the County, was fast filling up, a condition exacerbated by the increasing quantities of solid waste attracted to the landfill by dump closings.

6. The impending solid waste problem was recognized by responsible officials as a regional problem, and was discussed at several meetings between the Mayors of Akron, Cuyahoga Falls and Barberton during the first quarter of 1968. At the time, Barberton was disposing of its solid waste at two open dumps which could not comply with the new solid waste disposal regulation. Cuyahoga Falls was disposing of most of its solid waste at the Portage Landfill (operated by plaintiff Waldo A. Sober, Jr.); but the City was concerned about the continued ability of that landfill to operate under the new solid waste regulations, as well as the high hauling and disposal costs it was incurring using that landfill. Beginning in mid-1968, representatives of the County participated in these meetings.

7. In response to the solid waste problem, the City's Department of Planning and Urban Renewal ("Planning Department") undertook, in early 1968, a comprehensive study to find a long-term solution to the problem. The Planning Department considered a number of alternative means to effect a

long-term solution to the problem including sanitary landfill, transfer stations, incineration, composting, rail haul to strip mines, etc. Part 1 of this study, dated August, 1968, was devoted to sanitary landfills. In preparing this study, City employees inventoried existing disposal facilities both within and outside of Summit County which they determined to be inadequate. They also studied 102 potential landfill sites within Summit County, but determined that only 7 of these sites, all located in the southern part of the County, were feasible for landfill development from a physical-topographical standpoint.

8. As part of its comprehensive study, the City also helped finance and participated in a solid waste railhaul study sponsored by the American Public Works Association undertaken to research the technology and feasibility of hauling compacted solid waste to strip mines for disposal.

9. In May, 1968, representatives of the City took a field trip to New York and New Jersey to study the operation of solid waste incinerators in three communities. In late 1968, the Planning Department prepared a rough draft of Part 2 of its comprehensive study devoted to incineration. This draft generally concluded, among other things, that:

> "Despite the higher costs, disposal of solid wastes by incineration is inherently prompt, thorough and complete. Modern incinerator facilities are very efficient and are architecturally or aesthetically pleasing. There is little or no separating of solid waste required. A properly designed and operated incinerator can be constructed in a heavily built-up area without creating a nuisance. There should be no problem in meeting the State Health Department requirements.
>
> "It is possible to generate steam or electricity from the waste heat which may be held to offsett the relatively high operating costs." [p4]

The City's planners believed incineration was a superior long-range solution to landfilling for a number of reasons, including the facts that:

(1) An incinerator can be centrally located within the corporate limits, thereby obviating costly hauling and assuring that the City retains control over the facility.

(2) The ash can be used for fill or safely landfilled requiring the utilization of far less land.

(3) Incineration markedly reduces the pollution and nuisances associated with landfills and, to the extent it replaces coal fired boilers, actually reduces air pollution.

(4) The costs of operation can be offset by the sale of steam or electricity and recyclable materials.

10. By February, 1969, the City was sufficiently enthused by the incineration alternative to appropriate $22,000 to hire Glaus, Pyle & Schomer, an A&E firm with considerable experience in boiler design, to undertake a "Study of The Methods And Feasibility Of Incineration For Waste Disposal" including "[a]nalysis of waste heat recovery possibilities and consideration of waste heat recovery to offset expenses." Glaus, Pyle concluded that the technology for constructing and operating a "Recycle Energy System" (RES) to convert solid waste to steam or electricity was available. However, after investigating a number of different markets for steam or electricity which would be produced by an RES, Glaus, Pyle concluded that there was no available market. One such potential market, the steam users in Akron's Central Business District (CBD) whose needs were being satisfied by Ohio Edison, were not enthusiastic about buying steam from the City. Furthermore, the sharp seasonal variations in the CBD's steam load made an RES project to serve the CBD uneconomic unless B.F. Goodrich, which is located close to the CBD and uses substantial quantities of steam year-round for manufacturing purposes, could be persuaded to enter into

a long-term contract to purchase the project's excess steam on an interruptible basis. At that time, B.F. Goodrich was not interested in the project as a long-term source of steam. Consequently, the Glaus, Pyle study was shelved in September, 1969.

11. Meanwhile, an acute solid waste disposal problem created by the increasing quantities of solid waste being delivered to the Cuyahoga Street landfill forced the City's planners to concentrate on finding a stop-gap solution. In October, 1968, Martha D. Nelson, M.D., Health Commissioner of the Summit County General Health District, wrote the County Commissioners warning that the paucity of landfill sites in Summit County posed a serious problem. "This is a most urgent matter as it is entirely possible that on July 1, 1969 the Summit County area would be without any solid waste disposal facility." In subsequent meetings between officials of the County and City, a number of alternatives were discussed. In early 1969, officials of the City and County agreed to cooperate in creating a new landfill to be operated by the City as a regional project; and in March, the Commissioners created a Garbage and Refuse Disposal District pursuant to Title 343 of the Ohio Revised Code to facilitate the establishment and operation of a new regional landfill site.

C. The Hardy Road Landfill — A Short-Term Solution To The Problem

12. Faced with imminent closing of the Cuyahoga Street landfill, the City reluctantly decided to develop a new sanitary landfill on a 100 acre tract of woodland it owned outside of the City on Hardy Road in Northampton Township. The City's decision drew immediate, adverse response from residents in Northampton Township. In May, 1969, the Township Trustees filed suit against the City to enjoin a landfill operation on the Hardy Road site (*Leo Blower, et al.* v. *The City of Akron,* Summit County Case No. 276209), and the Court issued a preliminary injunction partially enjoining the acceptance of solid waste at the Hardy Road landfill site. This litiga-

tion was ultimately settled by agreement dated December, 1969, pursuant to which the City agreed to cease operating a landfill at the Hardy Road site at the expiration of five years, with a provisional right to operate for an additional three years if it had "operated the landfill strictly in accordance with applicable laws and regulations" during the first five year period.

13. The Hardy Road landfill opened for business in June, 1970. Total annual tonnage disposed of at the landfill from 1971 through 1978 is as follows:

Year	Tons*
1971	79,000
1972	70,988
1973	101,958
1974	164,325
1975	239,900
1976	239,399
1977	272,273
1978	284,122

* The scales at Hardy Road periodically fail to operate. Consequently, actual tonnage delivered exceeds these figures.

Since 1975, the Hardy Road landfill has been the only public solid waste disposal facility operating in the Akron area capable of disposing of solid waste. Public and private haulers of the solid waste generated within Akron, Barberton, Cuyahoga Falls and other communities in the Akron area dispose of most of the solid waste they collect in these communities at the City's Hardy Road landfill. Operation of the landfill has generated continuing complaints from its neighbors, the County Board of Health and the Ohio EPA. In 1975, Northamption Township again filed suit to shut down the landfill (*Board of Trustees of Northampton Township* v. *City of Akron*, Summit Co. C.P. Case No. 7592121); and in 1977, the County Board of Health instituted a proceeding to revoke the City's license to operate the landfill. In 1978, the City succeeded in annexing the Hardy Road site and contiguous land, thereby

relieving it of its contractual obligation to the Township to discontinue landfill operations on the site that year. But the operation of the landfill continues to generate protests [from] its neighbors, the County Board of Health and the Ohio EPA.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil Action C78-65A
and C78-1733A

GLENWILLOW LANDFILL, INC., *et al.*

v.

CITY OF AKRON, OHIO, *et al.*

HYBUD EQUIPMENT CORPORATION, *et al.*

v.

CITY OF AKRON, OHIO, *et al.*

JUDGMENT

This action came on for trial before the Court, Honorable Leroy J. Contie, Jr. _____, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered for the defendants and against the plaintiff on all claims.

LEROY J. CONTIE, JR.
Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX C

United States Constitution, article I, § 8

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

APPENDIX D

United States Constitution, amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

United States Constitution, amendment X

AMENDMENT X – RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

United States Constitution, amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Ohio Constitution, article XVIII, § 3

§ 3 [Powers.]

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

APPENDIX H

Sherman Act, 15 U.S.C. § 1, 2

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX I

Ohio Rev. Code Ann. § 715.43

§ 715.43 Refuse disposal.

Any municipal corporation may provide for the collection and disposal of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain and regulate plants for the disposal thereof.

APPENDIX J

Ohio Rev. Code Ann. § 717.01(c)

§ 717.01 Powers of municipal corporations.

Each municipal corporation may: . . .

(C) Erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations.

APPENDIX K

ORDINANCE NO. 541 — 1976 amending Section 850.06, 1068.06 and 1068.14 of the Codified Ordinances of the City of Akron to revise licensing requirements and service charges with respect to the collection and disposal of garbage and rubbish within the City, and declaring an emergency.

WHEREAS, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed.

NOW, THEREFORE, BE IT ENACTED by the Council of the City of Akron, Ohio:

Section 1. That Section 850.06 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 850.06 PLACES OF DEPOSIT; CHARGES

"(a) Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

"(b) In the event that the Mayor designates to holders of rubbish haulers' licenses that rubbish hauled, and from and after the date referred to in paragraph (a) above, rubbish not acceptable for disposal at the City's recycle energy plant, shall be deposited at a sanitary landfill site operated by the City, or at a site being operated under agreement with the City, then such rubbish hauler shall pay to the City a fee for each load of rubbish so

deposited, according to a schedule of charges prescribed by the Mayor. The charges prescribed by the Mayor shall be of such amount as to reimburse the City for the cost incurred in disposing of the rubbish so deposited.

"(c) The Mayor is hereby authorized to promulgate such rules and regulations as may be required to carry out the intent of this section."

Section 2. That Section 1068.06 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 1068.06 GARBAGE COLLECTED BY CITY OR PRIVATE HAULERS

"No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority of such license, if acceptable for disposal by the City's recycle energy plant be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal."

Section 3. That Section 1068.14 of the Codified Ordinances of the City of Akron, Ohio, is hereby amended so as to provide as follows:

"Section 1068.14 SERVICE CHARGE

"There is hereby established a fee, for combined curbside collection of garbage and rubbish of three dollars ($3.00) per quarter-year, beginning January 1, 1974, and continuing through December 31, 1977, and payable in advance. For so long as and provided the City Demonstration Agency or any other agency or entity pays the three dollar ($3.00) per quarter fee for service to residents of the Model Cities area, then the three dollar ($3.00) per quarter fee provided for herein shall be suspended for said Model Cities residents. The Director of Public Service is authorized to promulgate rules and reg-

ulations for the collection of said service charge, and he is further authorized with the consent of Council to adjust said charge upward or downward on January 1 of each of the years 1975 through 1977, inclusive, such adjustment to be made only to the extent that may be necessary to maintain the total cost of garbage and rubbish collection borne by the general revenue of the City of Akron at $830,000.00 per year. The said service charge shall be applicable only to households which participate in the collection program.

"Effective January 1, 1978, there is hereby established a fee for combined curbside collection of garbage and rubbish and for the disposal thereof of $4.36 dollars per month, payable in advance. The Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with the consent of Council to adjust said charge upward on January 1, 1979 or on January 1 of any year thereafter. The Director of Public Service is further authorized on January 1 of any year when there is on deposit on such date and appropriated by this Council a sum of money to pay costs of such collection and disposal to adjust said service charge downward to a charge which will produce funds which when added to the sum of money so on deposit and appropriated will be sufficient to pay all costs of such collection and disposal. The said service charge shall be applicable only to households which participate in the collection program."

Section 4. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were passed in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 5. That this ordinance is hereby declared to be an emergency measure for the reason that the provisions hereof should become effective at the earliest possible time in order to permit the financing of the recycle energy facility to be accomplished without undue delay, and provided that this ordi-

nance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: October 4, 1976

EDWARD DAVIS
Edward Davis
Clerk of Council

RAY KAPPER
Ray Kapper
President of Council

Approved: October 5, 1976

_____, Acting Mayor

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3121

HYBUD EQUIPMENT CORP., *et al.*,

Appellants

v.

CITY OF AKRON, *et al.*,

Appellees

Motion By Amicus Curiae United States For Modification Of Decision

The United States, as *amicus curiae,* respectfully moves this Court, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, to reconsider and modify a portion of the opinion filed July 17, 1981. Specifically, we are concerned that two statements in the Court's opinion could be misconstrued as stating that the United States took positions in the case which we did not in fact express.

At the outset, we must stress to the Court that we are extremely pleased with the Court's decision in this case. The Court's decision presents a thorough and thoughtful explication of the law and upholds a municipal program of importance to the nation. In light of our overall satisfaction with the Court's decision, we are of course hesitant to make a motion for modification. Nevertheless, we are seriously concerned that two statements in the Court's opinion could be interpreted as attributing positions to the United States which we did not take in the case.

1. First, on page 7 of the slip opinion, the Court states:

> "The defendants as well as the United States Department of Justice in an amicus brief filed on behalf of the Environmental Protection Agency and the Department of Energy argue, however, that the anticompetitive steps

> taken to make the plant feasible accord with national energy and environmental policy."

Although it is certainly true that we strongly believe that the municipal government's efforts are in accord with national energy and environmental policy and agree that such considerations may be relevant to the antitrust issue in the case, this statement creates the erroneous impression that the United States addressed the antitrust issue and supported the City of Akron on that issue. In fact, we did not take any position on that issue. *See* Br. 1-2, 12 & n.3. Accordingly, we respectfully request that the Court modify its opinion by deleting the reference in the text to the United States Department of Justice, Environmental Protection Agency, and Department of Energy. The reference to our brief in the accompanying footnote 4 and on pages 17-18 do not create any similar ambiguity and thus no modifications are necessary.

2. Second, on page 19 of the Court's slip opinion, the Court states:

> We are uncertain whether or not this argument represents good public policy. The legislators, planners and administrators involved do not agree with it. The planners and legislators for the City, the Environmental Protection Agency and the Department of Energy agree that private markets should be replaced by municipal control of recyclable wastes in this instance. The policy question here, in our judgment, is debatable and should not be taken out of municipal hands by federal courts in the absence of congressional intent clearly expressed.

The thrust of our argument was not that the City of Akron should replace private markets with municipal control — this we regard as a political decision — but rather that the Constitution did not forbid it. We did not address the policy issue of whether the City *should* have acted in this manner, but rather that it constitutionally *could* and that local experimentation in the complex area of solid waste management is important and should be encouraged. *See* Br. 13, 18-20. Thus the Supreme Court has this term sustained the constitutionality of the State of Minnesota's ban on nonreturnable, nonrefillable

plastic milk containers, even though there was no assurance that the State's experiment would in fact succeed. *Minnesota* v. *Clover Leaf Creamery Co.*, No. 79-1171 (Jan. 21, 1981). The spirit of experimental federalism which lies behind the City of Akron's ordinance was best articulated nearly fifty years ago in Justice Brandeis' dissent in *New State Ice Co.*, v. *Liebmann*, 285 U.S. 262, 311 (1932): "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizen choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." This was the crux of our position. Accordingly, we respectfully request that the statement indicating that the Environmental Protection Agency and Department of Energy advocate municipal control of waste disposal be deleted.

CONCLUSION

For the foregoing reasons, we move this Court to modify its opinion to remove ambiguities which suggest that we either addressed the antitrust issue in the case or took the position that municipal control of solid wastes should, as opposed to could, replace private markets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 31st day of July, 1981, the foregoing Motion for Modification of Opinion was served on appellants by depositing one copy thereof in the United States mail, postage prepaid, addressed to:

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No. 80-3121

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HYBUD EQUIPMENT CORP., *et al.*,
Plaintiffs-Appellants

v.

CITY OF AKRON, *et al.*,
Defendants-Appellees

Before: MERRITT and MARTIN, *Circuit Judges;* GORDON, *Senior District Judge**

Order

FILED
September 10, 1981

The motion of the government as amicus curiae for modification of two paragraphs in the opinion already filed and published is hereby denied. The language sought to be changed should not be read as suggesting that the government took a solid position respecting the antitrust issues decided by the Court.

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF
THE COURT

Clerk

* The Honorable James F. Gordon, Senior District Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 4 1981
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-723

HYBUD EQUIPMENT CORP., et al.,
Petitioners,

v.

CITY OF AKRON, OHIO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that the City of Akron, Ohio's ordinance controlling the disposal of solid waste collected within City limits, which was enacted pursuant to the City's constitutional home rule powers and at the insistence of an agency of the State of Ohio, is exempt from the application of the federal antitrust laws?

2. Did the Sixth Circuit err in holding that the City of Akron may, pursuant to its constitutional home rule police powers, require all solid waste collected within the City limits to be brought to the City's Recycle Energy System for disposal without bringing about an unconstitutional taking of certain recyclable materials mixed within that solid waste?

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Ohio Water Development Authority, City of Akron, Ohio, and County of Summit, Ohio, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 654 F.2d 1187.

COUNTER STATEMENT OF THE CASE

In the late '60's, officials of the City of Akron and of Summit County, Ohio, foresaw an impending solid waste disposal crisis principally triggered by (a) Ohio's new, stringent solid waste disposal regulations, which placed substantial constraints on the future location and operation of waste disposal sites, and (b) the fast diminishing capacity of existing landfill sites within the County. [Petitioners' Appendix B at B-41; Petitioners' Appendix A at A-3]

In response, Akron's Planning Department undertook extensive studies of alternative, long-range solutions to the solid waste disposal problem. [Petitioners' Appendix B at B-41-B-42; Petitioners' Appendix A at A-3] The City's planners concluded that a recycle energy system ("RES"), designed to incinerate solid waste and to produce energy using the heat generated by incineration, was the best long-range solution to that problem. [Peti-

tioners' Appendix B at B-42-B-43; Petitioner's Appendix A at A-3] However, the RES concept was shelved as economically unfeasible because at the time no potential markets existed for the energy that the facility would generate. [Petitioners' Appendix B at B-43-B-44]

Circumstances changed in the early 1970's when Ohio Edison Company, which had been providing steam to Akron's central business district, petitioned the Public Utilities Commission of Ohio to abandon that service. [Petitioners' Appendix B at B-30-B-31; Petitioners' Appendix A at A-3] With the steam market now available, the City determined that RES could be economically feasible and presented the best long-term solution to the City's solid waste disposal problem. [Petitioners' Appendix B at B-31] A significant factor in the City's decision to undertake RES was the continuing problems, controversy and litigation generated by the City's only landfill, which was and is located in an

unincorporated area outside the City. [Petitioners' Appendix B at B-44-B-46; Petitioners' Appendix A at A-3]

After an unsuccessful attempt to finance the proposed RES with its own revenue bonds, the City asked the Ohio Water Development Authority ("OWDA") to finance the project. [Petitioners' Appendix A at A-3] OWDA, an agency of the State of Ohio, is mandated by law to implement "the public policy of the State . . . to provide . . . efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid waste . . . ." Ohio Rev. Code § 6123.03 [Respondents' Appendix A]. To effect its mandate, the General Assembly has vested OWDA with power to finance solid waste projects by issuing revenue bonds (Ohio Rev. Code § 6123.04(F) [Respondents' Appendix B]), and in conjunction with such projects and their financing, to enter into cooperative agreements with other governmental agencies containing such terms as are necessary to safe-

guard ". . . the respective interests of the parties thereto . . ." (Ohio Rev. Code § 6123.13 [Respondents' Appendix C]).

After concluding that Akron's proposed RES would further the state policy that OWDA has been mandated to implement, OWDA agreed to finance the project. [Petitioners' Appendix A at A-3] OWDA and its underwriters concluded that in order to market the revenue bonds, it would be necessary to assure the bondholders that RES would receive an adequate supply of solid waste, and that to do so, it would be necessary for the City to exercise its constitutional home rule powers to require that all solid waste generated within the City's limits be taken to RES for disposal. [Petitioners' Appendix B at B-3; Petitioners' Appendix A at A-3] This requirement was embodied in a cooperative agreement entered into between OWDA, the City and Summit County. [Petitioners' Appendix A at A-3] Pursuant to that cooperative agreement, the City enacted the ordinance that

petitioners challenge in this litigation. [Petitioners' Appendix A at A-3]

The ordinance at issue controls only the disposal of mixed solid waste, that is, solid waste made up of a mixture of nonrecyclable and recyclable materials. [Petitioners' Appendix A at A-3] The ordinance does not control the disposition of presorted recyclables - i.e., wastepaper, cardboard, and metals segregated for recycling or other use by the person generating the waste. [Petitioners' Appendix A at A-5]

Petitioners' challenge to the Akron ordinance was based upon the Sherman Act, 15 U.S.C. §§ 1 and 2, the Commerce Clause of the United States Constitution, and the United States Constitution's Fourteenth Amendment. The district court found for the respondents on all claims. [Petitioners' Appendix B] On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. [Petitioners' Appendix A] With respect to Petitioners' anti-

trust claims, the Sixth Circuit held that the City in enacting and enforcing the challenged ordinance is immune from the application of the Sherman Act. [Petitioners' Appendix A at A-15-A-19] The Sixth Circuit based its immunity findings on two rationale - the State action exemption to the antitrust laws first articulated in Parker v. Brown, 317 U.S. 341 (1943), and the exemption from federal regulation created by the Tenth Amendment as interpreted in National League of Cities v. Usery, 426 U.S. 833 (1976). [Petitioners' Appendix A at A-15-A-19] The Sixth Circuit also rejected Petitioners' Fourteenth Amendment taking argument, reasoning that the proper disposal of mixed solid waste is a serious problem and that the City properly exercised its police powers in controlling the disposal of that solid waste, even though it contained recyclable materials having value. [Petitioners' Appendix A at A-9-A-14]

It is undisputed that the challenged ordinance is a proper exercise of Akron's

constitutional, home rule police powers. Ohio Constitution, Article XVIII, § 3 [Petitioners' Appendix G]; State, ex rel. Moock v. City of Cincinnati, 120 Ohio St. 500, 166 N.E. 583, cert. denied, 280 U.S. 578 (1929); Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651, appeal dismissed for want of debatable question, 135 Ohio St. 319, 20 N.E.2d 720 (1939). It is further not contested that OWDA acted within its statutory powers in insisting that the City pass the challenged ordinance. Ohio Rev. Code §§ 6123.03, 6123.04, and 6123.13 [Respondent's Appendices A through C] The only question raised by the petitioners is whether these legitimate exercises of state powers offend either the Sherman Act or the taking prohibition of the Fourteenth Amendment.

Neither the district court nor the Sixth Circuit decided the question of whether, in the absence of immunity, the enactment and enforcement of the challenged ordinance would constitute a substantive violation of the

Sherman Act. Respondents vigorously maintained before both of the lower courts that the ordinance is a proper and reasonable exercise of the City's police powers, and, therefore, does not constitute an unreasonable restraint of trade in violation of the Sherman Act. Because the lower courts found the respondents immune from the application of the Sherman Act, neither decided the substantive violation issue.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN HOLDING THAT A HOME RULE CITY'S DECISION AS TO HOW ITS RESPONSIBILITY FOR SOLID WASTE DISPOSAL WILL BE DISCHARGED IS IMMUNE FROM THE ANTITRUST LAWS.

A. The Challenged Ordinance is Within the Parker v. Brown State Action Exemption.

Both the district court and the Sixth Circuit concluded that the challenged ordinance is immune from the application of the federal antitrust laws by virtue of the

Parker v. Brown state action exemption. The district court held that the City acted as a state sovereign in enacting the ordinance because its authority to do so flows directly from the people of the State of Ohio via the state constitution and that the OWDA's insistence upon the ordinance's passage provided the necessary state involvement to make the exemption applicable. [Petitioner's Appendix B at B-3-B-10] The Sixth Circuit eschewed any single theory for applying the Parker exemption and instead adopted an eclectic approach, citing a combination of factors, including the long tradition of municipal control over solid waste disposal decisions, the City's home rule status, and OWDA's involvement, in support of its holding. [Petitioners' Appendix A at A-17-A-18]

The issue of whether the City of Akron is a "state sovereign" for Parker v. Brown purposes, by virtue of its constitutional, home rule status, is substantially similar to the issue presently before this Court in

Community Communications Co., Inc. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), cert. granted, 101 S.Ct. 1756 (1981) (No. 80-1350). Respondents City of Akron and OWDA have submitted an amicus curiae brief in that case and will not endeavor here to recapitulate the arguments of respondent Boulder and of the various amici who have supported Boulder's position. This Court's decision in Community Communications, however, will not be dispositive of the present case.

Both the District Court and the Sixth Circuit pointed to OWDA's involvement as an additional ground for applying the Parker exemption. Relying upon this Court's plurality opinion in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), petitioners argue that OWDA's involvement does not rise to the level of a state mandate or policy favoring anticompetitive activity.

In so arguing, petitioners conveniently ignore the language of the Lafayette plural-

ity that defines state "mandate" for Parker exemption purposes.

> "This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislative contemplated the kind of action complained of." 435 U.S. at 415.

Consistent with that definition, the requisite state mandate is present here.

The City adopted the challenged ordinance pursuant to, and in compliance with, its covenant with OWDA. [Petitioners' Appendix A at A-3] A review of the statutes creating OWDA and establishing its powers reveals that the General Assembly contemplated that OWDA would impose conditions such as the ordinance upon beneficiaries of its financing.

In Ohio Revised Code § 6123.03, the General Assembly mandated OWDA to "operate in" the area of solid waste disposal by financing efficient solid waste disposal facilities. [Respondents' Appendix A] To effect its mandate, the General Assembly vested OWDA with broad authority to finance solid waste disposal facilities and to structure the financing of such facilities so as to best effectuate the State's policy and to protect its interests in the project. Thus, in Ohio Revised Code § 6123.04, the General Assembly provided that the OWDA may:

> "(I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. of the Revised Code;
>
> * * *
>
> "(F) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code." [Respondents' Appendix B]

The cooperative agreement between the City, County, and OWDA, which contains the chal-

lenged covenant, was authorized by the above-quoted provisions and by Ohio Revised Code § 6123.13 [Respondents' Appendix C], which provides in pertinent part:

> "Any governmental agency or combination thereof may cooperate with the authority in the acquisition or construction of a solid waste project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safe-guarding of the respective interests of the parties thereto . . . ."

Finally, the General Assembly has provided in Ohio Revised Code § 6123.03 [Respondents' Appendix A] that:

> "Determinations by resolution of the authority that a project is a solid waste facility under this chapter and is consistent with the purposes of Section 13 of Article VIII, Ohio Constitution, and this chapter shall be conclusive as to the validity and enforceability of the solid waste revenue bonds issued to finance such project and of . . . sale agreements, loan agreements and other agreements made in connection herewith, all in accordance with their terms."

OWDA has passed a resolution pursuant to the above-quoted statute approving the cooperative agreement with the City and the County, and, therefore, that agreement and the covenants contained therein are conclusively valid under Ohio law.

From this statutory scheme and the "authority" given to OWDA, there emerges a "state mandate" to enter into cooperative agreements containing whatever terms the OWDA determines to be necessary to the financing and viability of solid waste projects and to the advancement of the public policy stated in Ohio Revised Code § 6123.03. Certainly the General Assembly, in issuing such a mandate, "contemplated," in the manner that the Lafayette plurality used that term (435 U.S. at 415), "the kind of action complained of" in this case, namely that OWDA would insist that municipalities entering into such cooperative agreements do what the Ohio Supreme

Court (State, ex rel. Moock v. Cincinnati, supra*) and the Ohio Court of Appeals (Canton v. Van Voorhis, supra*) have said that they may legally do, pursuant to their home rule police powers, in aid of the solid waste projects involved and in furtherance of the state policy declared in Ohio Revised Code § 6123.03 [Respondents' Appendix A].

The availability of a "state mandate" ground for affirming the Sixth Circuit's decision on petitioners' antitrust claims weighs heavily against the granting of the writ in this case. The "state mandate" test for determining the applicability of the Parker exemption is clearly set forth in this Court's opinion in Lafayette and requires no additional development. That test is not being reevaluated in the context of the Community Communications case. The granting

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*In Moock and Canton, the courts upheld municipal ordinances monopolizing solid waste collection as proper exercises of constitutional, home rule police powers.

of certiorari here, therefore, would involve this Court in the application of a thoroughly developed and unchallenged test to a specific state statutory scheme. Since Lafayette, however, this Court has declined to embark on such exercises, electing instead to leave the scrutinizing of specific state statutory schemes in light of the "state mandate" test to the lower courts. E.g., Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), cert. denied, 439 U.S. 966 (1978). This Court's deferral to the lower courts on such matters is indeed appropriate and is the proper course of action here.

B. The Challenged Ordinance is Immune From the Antitrust Law by Virtue of the Tenth Amendment.

Because the challenged ordinance falls within the Parker state action exemption, the Tenth Amendment question presented by petitioners need not be reached. Nevertheless, the Sixth Circuit correctly held that the Tenth Amendment, as interpreted in National League of Cities v. Usery, 426 U.S. 833

(1977), shields respondents from antitrust liability.

Petitioners do not attack the Sixth Circuit's basic premise - i.e., that the Tenth Amendment may provide a basis for exemption from the application of the federal antitrust laws. Rather they argue that no such exemption is available on the facts of this case, relying for support on this Court's recent opinion in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 101 S. Ct. 2352 (1981).

Petitioners' reliance on Hodel is surprising because that opinion supports the case for the application of a Tenth Amendment exemption here and bolsters the reasoning of the Sixth Circuit. In Hodel, this Court set forth three requirements for the existence of a Tenth Amendment exemption from federal regulation.

> "First, there must be a showing that the challenged statute regulates the 'States as States.' *** Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *** And, third, it must be apparent that

> the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *** " 101 S. Ct. at 2366.

Each of these requirements is met here.

First, the federal regulation in question, the Sherman Act, does in this instance regulate "States as States" as opposed to private entities. The decision of how solid waste generated within a city's boundaries is to be disposed of has traditionally been entrusted solely to municipal government, and the discretion exercised in making that decision has been upheld by a long line of case law precedents.

> "Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. See Annots., Validity

> of Statutory or Municipal Regulations as to Garbage, 15 A.L.R. 287 (1921); 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). If any area of the law can be said to be well settled, this one is." [Petitioners' Appendix A at A-9]

The application of the Sherman Act here, therefore, regulates solely the City and its ability to decide how the solid waste generated within its borders will be disposed of. This should be contrasted with Hodel where the entities regulated by the federal statute in question were clearly private, coal mine operations.

Second, the federal regulation at issue here does address matters that are disputably "attributes of state sovereignty." The matter addressed is the City's power to regulate the collection and disposal of solid waste generated within its borders, which flows directly from the Ohio Constitution and, therefore, is a grant of sovereign power directly from the people of Ohio. As the Sixth Circuit observed in the opinion that petitioners' ask this Court to review:

"Akron exercises its municipal powers under a grant of municipal home rule found in Ohio's Constitution. Article XVIII, § 3 reads:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Section 7 of Article XVIII authorizes municipalities to adopt charters for their government and, 'subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.' Ohio case law holds that these state constitutional provisions 'pass the sovereign power of the state to the people of the city' and has the effect of delegating a part of the state's 'sovereignty' to the city, State ex rel. Toledo v. Lynch, 88 Ohio St. 500, 166 N.E. 583, cert. denied, 380 U.S. 578 (1929)." [Petitioners' Appendix A at A-8]

Third, the federal regulation at issue will, if applicable, directly impair the City's ability "to structure integral operations in areas of traditional functions." As is indicated above, absent the Sherman Act, the City has broad discretion in structuring operations for the disposal of solid waste

generated within its borders. The application of the Sherman Act, however, will severaly limit, if not eliminate, that discretion and virtually dictate the structure that those operations must take. Such a federal ordering of local government operations is exactly the result that the doctrine announced in National League of Cities v. Usery, supra, was designed to prevent.

The Tenth Amendment reserves to the states certain integral local functions and protects the states from federal intervention with respect to the ordering of those functions. One such function is the disposal of solid waste. The Sixth Circuit correctly concluded that the Tenth Amendment prevents the use of the Sherman Act as a vehicle to override municipal decisions concerning the

structure of local solid waste disposal operations.*

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT A CITY MAY REGULATE THE DISPOSAL OF MIXED SOLID WASTE, WHICH IS PER SE A NUISANCE, WITHOUT BRINGING ABOUT A TAKING OF RECYCLABLE MATERIALS CONTAINED IN THAT WASTE.

Petitioners do not dispute the general proposition that the City has the right to

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*The potential application of the Sherman Act to the challenged ordinance raises yet another Tenth Amendment consideration. Citing National League of Cities v. Usery, supra, OWDA argued to both the district court and to the Sixth Circuit that the application of the Sherman Act to the challenged ordinance would improperly reorder the allocation of sovereign power made by the Ohio Constitution. As is fully explained above, the City's power to pass the ordinance flows directly from the Ohio Constitution by the conscious choice of the citizens of Ohio. Should the Sherman Act apply, that power could be exercised only if the City first obtained specific enabling legislation from the General Assembly. For practical purposes, therefore, the sovereigny given to Akron and other charter municipalities by the Constitution would pass by operation of the Sherman Act to the General Assembly, a result contrary to the intent of the citizens of Ohio in ratifying the state constitution and violative of the Tenth Amendment. This Tenth Amendment violation, respondents maintain, further supports the Sixth Circuit's judgment.

take without compensation property that constitutes a nuisance and a threat to the health and safety of the community. Nor can they for that right has been solidly established by this Court. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 145 (1978) (Rehnquist, J. dissenting); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 321-23 (1905); Gardner v. Michigan, 199 U.S. 325, 331-33 (1905). Petitioners argue, however, that the California Reduction line of authority and the so-called "nuisance exception" to the taking prohibition are not applicable to the challenged ordinance because (1) the recyclables within the mixed solid waste regulated by the ordinance pose no health or safety threat to the citizens of Akron, and (2) the City is using the solid waste that the ordinance "forces" to RES to generate revenue.

Petitioners first argument--that the recyclable per se pose no health hazard--misses the mark in that it misconstrues the

subject of the ordinance's regulation. The ordinance regulates mixed solid waste, not recyclable materials separate from that waste. In isolation recyclable materials may or may not be a nuisance; it is unquestioned, however, that solid waste is a nuisance. California Reduction Co. v. Sanitary Reduction Works, supra, 199 U.S. at 323; Gardner v. Michigan, supra, 199 U.S. at 332-33; Spokane v. Carlson, 73 Wash. 2d 76, 436 P.2d 454, 457 n.2 (1968); Albaugh v. Abbott, 253 Mich. 588, 235 N.W. 263, 264 (1931). The presence in solid waste of materials which, in and of themselves, do not constitute a potential danger to the public health does not negate the City's power to regulate the collection and disposal of such solid waste as a whole. As this Court emphasized in California Reduction, a city may regulate the whole or the mass of solid waste because it constitutes a nuisance without regard for the components that make up that mass:

> "The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and refuse matter were all together, on the same premises, and as a whole or in the mass they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit." 199 U.S. at 322-23.

The district court specifically found that Akron's solid waste contains materials that present a danger to the public health, welfare and safety if the mass of Akron's solid waste is not properly disposed of [Petitioners' Appendix B at B-15-B-16], and the Sixth Circuit observed that solid waste disposal is as much a problem for cities today as in the past [Petitioners' Appendix A at A-12]. Petitioners do not contest these realities, which alone justify the municipal action that petitioners challenge.

Petitioners' second argument--that the ordinance takes their property because the City is using the solid waste to generate revenues--is based on (1) an unrealistically

narrow view of the Ordinance and its relationship to RES and (2) bad logic.

First, the district court correctly held that the City adopted the ordinance to control a potential nuisance, not to raise revenue to enrich itself.

> "The Court finds that the plaintiffs' understanding of the legislative purpose is overly circumscribed and removes the ordinance from its proper context. As indicated by the whereas clause on which the plaintiffs rely, the ordinance cannot be separated from the RES. Likewise, the City's purpose in constructing, and in financing the construction of the RES cannot be separated from the ordinance.
>
> * * *
>
> "The Court finds that the ordinance is a regulation adopted to control a nuisance (or potential nuisance) that incidentally impacts on some collectors who separate materials of value from the waste they collect.
>
> * * *
>
> "The ordinance is . . . part of the City's broader scheme to dispose of waste in a safe and sanitary manner at the RES. The ordinance is a reasonable means to achieve this legitimate goal." [Petitioners' Appendix B at B-14, B-16]

These findings were affirmed by the Sixth

Circuit and bring the ordinance within the "nuisance exception" to the taking prohibition.

Second, there is no logical nexus between the fact that RES will generate revenues to defray disposal costs and the conclusion petitioners would draw therefrom that the ordinance effects a taking. Indeed, extending petitioners' reasoning to its logical limits results in the absurd conclusion that there would be no taking if the City simply incinerated the waste and landfilled the residue, recyclables and all, but that a taking has occurred because the City is making good use of the waste to produce saleable steam and recyclable ferrous metal to pay off the bonded indebtedness incurred by the City to make RES a reality. Neither common sense nor decided case law supports such reasoning.

In view of all of the foregoing, respondents respectfully submit that the Sixth Circuit correctly concluded that this Court's

opinions in California Reduction Co. v. Sanitary Reduction Works, supra, and Gardner v. Michigan, supra, are dispositive of petitioners' taking claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX A

Ohio Revised Code § 6123.03

§ 6123.03 [Purposes.]

It is hereby declared to be the public policy of the state through the operations of the Ohio water development authority under this chapter to contribute toward one or more of the following: to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid wastes thereby eliminating or decreasing accident and health hazards including rodent and insect vectors of disease, public nuisance and the adverse effect on land values caused thereby and the scenic blight marring the landscape, to assist in the financing of solid waste facilities for industry, commerce, distribution and research, including public utility companies, to create or preserve jobs and employment opportunities or improve the economic welfare of the people of the state, or to assist and cooperate with governmental agencies in achieving such purposes. In furtherance of such public policy, the Ohio water development authority may initiate, acquire, construct, maintain, repair and operate solid waste projects or cause the same to be operated pursuant to a lease, sublease, or agreement with any person or governmental agency; may make loans and grants to governmental agencies for the acquisition or construction of solid waste facilities by such governmental agencies, may make loans to persons for the acquisition or construction of solid waste facilities by such persons; and may issue waste revenue bonds of this state payable solely from revenues, to pay the cost of such projects. Any solid waste project shall be determined by the authority to be in

compliance with Chapter 3734. of the Revised Code and with the regulations adopted by the director of environmental protection under section 3734.02 of the Revised Code. Any resolution of the authority providing for acquiring or constructing such projects or for making a loan or grant for such projects shall include a finding by the authority that such determination has been made. Determinations by resolution of the authority that a project is a solid waste facility under this chapter and is consistent with the purposes of Section 13 of Article VIII, Ohio Constitution, and this chapter shall be conclusive as to the validity and enforceability of the solid waste revenue bonds issued to finance such project and of the resolutions, trust agreements or indentures, leases, sub-leases, sale agreements, loan agreements and other agreements made in connection therewith, all in accordance with their terms.

APPENDIX B

Excerpts from Ohio Revised Code § 6123.04

§ 6123.04 [Powers and duties.]

For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may--

* * *

(F) Issue solid waste revenue bonds and notes and solid waste revenue refunding bonds of the state, payable solely from revenues as provided in section 6123.06 of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more solid waste projects or parts thereof;

* * *

(I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. of the Revised Code:

* * *

(P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

APPENDIX C

Excerpt from Ohio Revised Code § 6123.13

§ 6123.13 [Rental agreements.]

Any governmental agency or combination thereof may cooperate with the authority in the acquisition or construction of a solid waste project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, which agreements shall provide for such contributions by the parties thereto in such proportion as may be agreed upon and such other terms as may be mutually satisfactory to the parties including without limitation the authorization of the construction of the project by one of the parties acting as agent for all of the parties and the ownership and control of the project by the authority to the extent necessary or appropriate for purposes of the issuance of solid waste revenue bonds by the authority.

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Petitioner's Reply Brief

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No. 81-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HYBUD EQUIPMENT CORP., BUDOFF IRON & METAL CO., GLENWILLOW LANDFILL, INC., WALDO A. SOBER, JR., J.P. HAWLEY SANITATION, INC. & G. G. KOVACH,
Petitioners-Plaintiffs,

v.

CITY OF AKRON, OHIO, JOHN S. BALLARD, RAY KAPPER, ELSIE REAVEN, JAMES R. WILLIAMS, TIM DAVIS, VINCENT CIRACO, ROBERT L. GOEHLER, REGINALD K. BROOKS, KATHLEEN GREISSING, ROBERT J. OTTERMAN, MICKEY ERITANO, JR., JOHN V. FRANK, DON PLUSQUELLIC, WILLIAM C. GRIMM, ROBERT EDWARDS, COUNTY OF SUMMIT, OHIO, MARK RAVENSCRAFT, TED COLES, DON STEPHENS, AND OHIO WATER DEVELOPMENT AUTHORITY,
Respondents-Defendants.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners file this reply brief in support of their petition for *certiorari* pursuant to Rule 22.5 of this Court's Rules.

1. There Is No Alternative Ground For Antitrust Immunity

As asserted in their petition, petitioners believe that the applicability of the antitrust laws to this case should be deter-

mined pursuant to the *Parker* v. *Brown*[1] doctrine and the result this Court reaches in *Community Communications Co., Inc.* v. *City of Boulder*.[2] However, the Sixth Circuit in deciding this case below introduced confusing constitutional doctrines explicated in *National League of Cities* v. *Usery*.[3] Because these constitutional doctrines are not in issue in *Community Communications Co., Inc.*, we have urged the Court to grant *certiorari* here to determine what, if any, relevance the Tenth Amendment has to this established area of antitrust inquiry.[4]

Respondents attempt to avoid this Court's review of the Tenth Amendment issue by asserting that there is an alternative, clear ground for affirming a finding of antitrust immunity under *Parker* v. *Brown:* that state legislation that authorizes the actions of the Ohio Water Development Authority ("OWDA") meets the standards for "state action" antitrust immunity developed in *Parker* and, most particularly, in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Respondents' argument is premised on a misstatement of Ohio law and the decisions below. There is in fact no alternative ground for affirming antitrust immunity. A review of the pertinent state legislation clearly shows no state contemplation of anticompetitive behavior. Moreover, a review of the record shows that neither court below accepted respondents' argument that there was any such contemplation, as was required by *Parker* and *Lafayette*.

OWDA is an Ohio state agency authorized to issue revenue bonds to finance solid waste disposal facilities. It has no regula-

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[1] 317 U.S. 341 (1943).

[2] 630 F.2d 704 (10th Cir. 1980), *cert. granted*, 101 S. Ct. 1756 (1981) (No. 80-1350).

[3] 426 U.S. 833 (1976).

[4] Of course, in addition to this consideration, the instant case presents to the Court the opportunity to consider the underlying question in *Community Communications Co., Inc.* in a somewhat different factual context.

tory authority. The City of Akron sought its assistance in financing the RES. When the underwriters advised that respondents should force solid waste generated within Akron's borders to the RES to assure its revenues, the City and OWDA agreed and the City enacted the Ordinance challenged here. Nothing in the record remotely supports the suggestion that OWDA had any statutory direction — or any actual interest — in monopolizing waste disposal and recycling in Akron.

Respondents rely on Ohio Revised Code Sections 6123.03, 6123.04 and 6123.13 for the assertion that the General Assembly contemplated that OWDA, in connection with its financing of projects, would require actions such as Akron's ordinance monopolizing solid waste disposal. However, a review of these provisions, which are reprinted in respondents' appendix, demonstrates that they do not support any conclusion that the state adopted a policy to displace competition. Section 6123.03 merely endorses certain environmental goals and provides that OWDA may assist in financing projects to facilitate such goals and that its determinations are final with respect to the bonds it issues and agreements it enters in that connection. Section 6123.04 merely authorizes OWDA to enter into agreements to carry out its authorized purposes. And Section 6123.13 specifies that OWDA may reach agreements with other governmental entities in this connection. The provisions relating to the agreements are obviously intended to authorize the normal commercial agreements that would be utilized in such situations. [5]

It is equally obvious that these provisions do not grant OWDA powers to override other laws such as the antitrust

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[5] Thus the second half of Section 6123.13, which respondents omitted in the quote in their brief but included in their appendix B, specifies some of the commercial issues about which other governmental units might agree with OWDA.

laws.[6] They say nothing about the means by which environmental goals are to be achieved. Nothing in the statute even hints at, much less clearly articulates, any state policy to displace competition with regulation in the waste recycling and disposal field.

The two state cases cited by respondent are irrelevant to the issue of legislative intent.[7] Those cases upheld local regulation of garbage disposal against constitutional challenges. Neither case articulated any state policy to displace competition with regulation in the waste disposal field and neither case considered the question of conflict with state or federal antitrust laws. Although reflecting the view that home rule in Ohio authorizes local decisions on such issues,[8] neither case indicates that the state legislature, in authorizing OWDA's activities, desired OWDA to resort to anticompetitive behavior to assure the economic viability of projects such as the RES.

Of course, state neutrality on the issue of anticompetitive practices is not sufficient to exempt actions of its agencies from antitrust scrutiny, because when agencies ". . . are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State."[9] To bring its actions within the *Parker* v. *Brown* exemption, a

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[6] To the contrary, it is clear that Ohio has a "uniform state policy" favoring competition as expressed in the Ohio antitrust law, the Valentine Act. Ohio Rev. Code Ann. §1331.01 *et seq*.

[7] State ex rel. Moock v. City of Cincinnati, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929); Canton v. Van Voorhies, 61 Ohio App. 419, 22 N.E.2d 651, *appeal dismissed*, 135 Ohio St. 319, 20 N.E.2d 720 (1939).

[8] Petitioners question whether such regulation is permissible under Ohio's law given the conflict with the state antitrust laws. However, this issue need not be decided by this Court.

[9] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 414.

state agency must show that the state has mandated or authorized the displacement of competition with regulation or monopoly service, either by a detailed legislative authorization or by showing from the authority given a governmental entity to operate in a particular area that the legislature intended the kind of anticompetitive behavior involved. As demonstrated above, the provisions cited by respondents contain no indication that the Ohio General Assembly mandated, authorized or intended the displacement of competition with regulation or monopoly service. [10]

Moreover, the courts below did not, in fact, adopt respondents' argument. The Sixth Circuit made only one limited reference to OWDA in holding that the challenged actions were immune from antitrust scrutiny. (Pet. App. A at A-17) It did not in any way hold that the Ohio General Assembly had mandated or contemplated the substitution of competition by monopoly or regulation in its statutory authorization of OWDA.

Nor did the District Court adopt respondents' argument. It held that OWDA was carrying out the state's policy to provide financial assistance to subdivisions building solid waste disposal facilities without harm to the state's treasury through the issuance of revenue bonds. (Pet. App. B at B-5 to B-8) It never even focused on whether the state legislature had mandated or intended that this state financing agency should use anticompetitive means to further these goals. In fact, the District Court held that Ohio's statewide policy does not address whether there shall be competition or monopoly in solid waste disposal, but instead leaves this completely up to the preference of local authorities. (Pet. App. B at B-9)

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[10] In fact, respondents' argument at page 16 of their brief — that OWDA is authorized to enter into agreements containing "whatever terms the OWDA determines to be necessary" — shows that the decision to use anticompetitive means here reflects the preference of OWDA and Akron, *not* the policy choice of the state.

For these reasons it is clear that there is no alternative ground for affirming the holding of antitrust immunity. Thus, there are only two bases for finding antitrust immunity in this case, and if *Community Communications Co., Inc.* does not control this issue then this case presents to the Court a unique Tenth Amendment/antitrust exemption holding.

2. Respondents' Argument Fails To Acknowledge The Constitutional Issue.

Respondents suggest that our only disagreement with the Sixth Circuit is in the interpretation of *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 101 S.Ct. 2352 (1981). This misses our basic point that it is improper altogether to introduce Tenth Amendment issues into the evaluation of immunity of local government actions from antitrust scrutiny. The same policy value embodied in the Tenth Amendment — concern for federalism — is at the core of the *Parker* v. *Brown* doctrine. But the constitutional doctrine explicated in *National League of Cities* and in *Hodel* focuses on protecting the internal organization and structure of local governmental units. [11] By way of contrast, the antitrust laws do not affect such internal matters but only the efforts of state and local governments to restrict private activities. The decisions by this Court in the antitrust area have taken into account these considerations. For these reasons, introducing constitutional issues into this area would lead to needless confusion. [12]

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[11] Respondents' discussion of *Hodel* focuses on only one quote in that case. A review of *Hodel* shows that it is similar to this case. There the state argued that an area of regulation was a traditional governmental function. But the Court held that local government regulation of private activity must give way to federal regulation under the commerce clause.

[12] Respondents' arguments regarding the taking claim fail to address two critical points. Unlike the cases relied on by the Sixth Circuit, here there is no overriding health concern. Also, we do not assert that it is better for the government to bury the material than to sell it. But, when the very purpose for taking the property is to allow the RES to increase its revenues, the Constitution requires compensation.

Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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